Supreme Court, U.S.
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No.

In the Supreme Court of the United States

JAVITCH, BLOCK & RATHBONE, LLP, AND
GREAT SENECA FINANCIAL CORP.,
Petitioners,

v.

DELORES HARTMAN, DEBORAH L. RICE,
AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 15 U.S.C. §§ 1692e, 1692e(10), 1692f, 1692k(c) of the Fair Debt Collection Practices Act (FDCPA) are unconstitutional as applied to literally true but potentially misleading representations in pleadings under the First Amendment, Fifth Amendment, and the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution.

2. Whether evidence that a debt collector acted in good faith and reasonably under the circumstances qualifies for the bona fide error defense under the FDCPA, 15 U.S.C. § 1692k(c).

PARTIES TO THE PROCEEDINGS & CORPORATE DISCLOSURE STATEMENT

Petitioners Javitch, Block & Rathbone, LLP and Great Seneca Financial Corp. were the Defendants and the Appellees below. Pursuant to Rule 29.6, there is no parent or publicly held company owning 10% or more of the corporation's stock, in Great Seneca Financial Corp., or Javitch, Block and Rathbone, LLP.

Respondents Delores Hartman and Deborah L. Rice were the Plaintiffs and Appellants below. The United States of America intervened below to defend the constitutionality of the FDCPA.

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PETITION FOR WRIT OF CERTIORARI

Javitch, Block & Rathbone, LLP ("JB&R") and Great Seneca Financial Corp. ("Great Seneca"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 2-29) is reported at 569 F.3d 606. The order of the court of appeals denying rehearing and rehearing en banc is reprinted at Pet. App. 62 and is not otherwise published. The opinion of the District Court in *Rice v. Great Seneca Financial Corp.*, Case No. 2:04-CV-00951 (Pet. App. 30-53), is reported at 556 F.Supp.2d 792. The opinion of the District Court in *Hartman v. Great Seneca Financial Corp.*, Case No. 2:04-CV-00972 (Pet. App. 54-61) is unreported, but available at 2008 Westlaw 2169051.

JURISDICTION

The Court of Appeals entered its judgment on June 30, 2009. A timely petition for rehearing and rehearing en banc was denied on September 22, 2009. Pet. App. 62. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution provides: "The Congress shall have Power ... [t]o regulate Commerce ... among the several States...." U.S. Const. art. I, §8, cl. 3. The

First Amendment to the United States Constitution provides: "Congress shall make no law ... abridging the freedom of speech...; or the right of the people ... to petition the Government for a redress of grievances." U.S. Const. amend I. The Fifth Amendment to the United States Constitution provides: "No person shall be ... deprived of life, liberty, or property, without due process of law...." U.S. Const. amend V.

15 U.S.C. § 1692e of the Fair Debt Collection Practices Act (FDCPA) provides:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
> (1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.
> (2) The false representation of—
> (A) the character, amount, or legal status of any debt; or
> (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.
> (3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.
> (4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the

seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the

consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

15 U.S.C. § 1692f of the FDCPA provides:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to

the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

15 U.S.C. § 1692k(c) provides in pertinent part:

(c)Intent

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

STATEMENT

In 1977, Congress enacted the Fair Debt Collection Practices Act (FDCPA) to regulate the debt collection industry. Fair Debt Collection Practices Act, Pub.L. 95-109, 91 Stat. 874, 875 (1977). When originally enacted, the definition of a "debt collector" excluded "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." Pub.L. 95-109, § 803(6)(F), 91 Stat. 874, 875. The FDCPA purported to regulate extra-judicial communications, acts and practices directed to consumers and third parties – late night telephone calls, threats of harm, harassing letters, disclosures of embarrassing debt information to employers,

neighbors and family. S. Rep. No. 382, 95th Cong., 1st Sess. 1977, 1977, U.S.C.C.A.N. 1695, 1696.

In 1986, Congress repealed the attorney exemption. Fair Debt Collection Practices Act, Amendment, Pub.L. 99-361, 100 Stat. 768. H.R. Rep. No. 405, 99th Cong., 1st Sess. 1985, 1986 U.S.C.C.A.N. 1752 (November 26, 1985). The exemption was repealed because attorneys, who did not engage in litigation, had entered into direct competition with lay debt collectors and used the exemption "to evade compliance with the Act." H.R. Rep. No. 99-405, pp. 1-2, 99th Cong., 1st Sess. 1985, 1986 U.S.C.C.A.N. 1752, 1752. The amendment was intended to place these attorneys under the same standards as lay debt collectors. H.R. Rep. No. 405, p. 5; *Jenkins v. Heintz*, 124 F.3d 824, 833-834 (7th Cir.1997), cert. denied 523 U.S. 1022 (1998); *F.T.C. v. Shaffner*, 626 F.2d 32 (7th Cir. 1980); 131 Cong.Rec. H10534-02 (Remarks of Rep. Annunzio) (December 2, 1985).

In 1995, this Court decided *Heintz v. Jenkins*, 514 U.S. 291 (1995). *Heintz v Jenkins* assessed whether the Act's definition of a debt collector, 15 U.S.C § 1692a(6), contained an implied exception for attorneys engaged in litigation. *Heintz v. Jenkins*, 514 U.S. 291, 292. This Court held it did not. *Heintz* rested its holding on the plain language of the statute and the 1986 amendment eliminating the attorney exemption. *Heintz*, 514 U.S. 291, 294-95. *Heintz* observed that the anomalies suggested by applying the Act to attorneys engaged in litigation would be mitigated by the availability of the bona fide error defense and "depend for their persuasive force upon readings that courts seem unlikely to endorse," *Id.* at 295-96.

1. In October 2003, Great Seneca Financial Corp. (Great Seneca), by and through its attorney Javitch, Block & Rathbone (JB&R), filed a civil complaint against Delores Hartman in the County Court for Harrison County, Ohio, which sought to recover $2,551.30 owed Great Seneca. Pet. App. 55. Likewise, Petitioners filed suit against Deborah Rice in October, 2003 in the Jefferson County Court No. 2, Jefferson County, Ohio, which sought to recover $2,778.99. Pet. App. 31. The state court complaints in each case stated (varying only by the amount pled in each case):

> 1. There is due the Plaintiff from the Defendant upon an account, the sum of $2,551.30 [$2,778.99].
> 2. A copy of the said Account is attached hereto and marked as "Exhibit A."
> 3. Although due demand has been made, Defendant has failed to liquidate the balance due and owing.
> WHEREFORE, the Plaintiff prays for a Judgment against the Defendant in the amount of $2,551.30 [$2,778.99] with interest at the rate of 10% per annum from date of judgment, and costs of the within action.

Pet. App. 31, 55. An account statement prepared by Great Seneca for purposes of litigation was attached as Exhibit A to each complaint. Pet. App. 31-32, 56. The account statement listed the balance due and identified as a new transaction, the assignment of the debt for the original lender, Providian, and an intermediary debt buyer Unifund. Exhibit A varied in these two cases only by the Respondent's name and address, and the amounts listed. The account

statement in Respondent Rice's case is set out in the Appendix. Pet. App. 63.

2. In two separate actions commenced in the U.S. District Court for the Southern District of Ohio, Eastern Division, Respondents argued that Petitioners violated 15 U.S.C. §§ 1692e, 1692e(10), and 1692f because lawsuits filed against them in state court seeking to collect their unpaid debts were false or contained literally true but allegedly misleading statements. Pet. App. 35-36, 59-60. The jurisdiction of the district court was invoked under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331.

3. On cross-motions for summary judgment, Respondents argued, without any supporting evidence, that the statement was intended to resemble a credit card statement for the ostensible purpose of fooling consumers into believing that Great Seneca had a originated a credit card obligation, that it was "bogus" and "fake" because the "true" account records of the original creditor were not attached to the complaint, and that it was used to avoid Ohio pleading requirements for suits on accounts. Pet. App. 43-45.

The District Court held that Petitioners demonstrated that the allegations made were not false; that Great Seneca, as assignee, had a valid claim for money owed on an account at the time suits were filed against Respondents for the exact amounts pled; that Exhibit A was a record generated Great Seneca that "accurately reflected the terms of that account;" and that the statement in paragraph two of the state court complaints did not violate 15 U.S.C. §§ 1692e or 1692e(10). Pet. App. 38-41, 59-60.

As to the contention that despite being literally true, Exhibit A was misleading, the district Court held, evaluating the statement from the

perspective of the least sophisticated consumer, that with a careful reading of the account statement, even the least sophisticated consumer would understand that Exhibit A was an account statement generated by the assignee of the account-Great Seneca, and related to the original credit obligation of Providian National Bank. Pet. App. 43-45. The district Court further noted that Respondents "presented no affidavits, no expert opinion, nothing to demonstrate that there is a genuine issue of fact as to the nature of the Exhibit A statement." Pet. App. 45.

As alternate grounds for its ruling, the District Court held that both Great Seneca and JB&R were entitled to judgment under the FDCPA's bona fide error defense. Pet. App. 45-48, 59-60. As to Great Seneca, the Court held the evidence showed the account statement was "intended to serve as evidence of Great Seneca's ownership of the debt, and it was not intended to mislead, deceive or misrepresent the character or nature of the debt[;]...that no person has ever claimed that they were misled, deceived, or that they misunderstood the Great Seneca account statement[;]...and that they followed existing case law, that they engaged a law firm specializing in debt collection to manage its portfolio, and that the law firm was responsible for compliance with the FDCPA." Pet. App. 46-47. As to Petitioner JB&R, the District Court held the evidence showed it "reasonably relied on its client's representations about Plaintiff's account[;]"...and that in the co-managing partner's view it was a permissible practice under Ohio law, and was not prohibited by the FDCPA, for a purchased debt creditor to be plead recovery of an assigned credit card debt as an account claim, using the "business record created by the purchased debt creditor reflecting the amount

owed on the credit card debt...." Pet. App. 47. The district court declined to reach the constitutional issues raised by Petitioners. Pet. App. 50-51, 59-60.

4. In a plurality decision, the Court of Appeals reversed on the issues of liability, bona fide error and rejected Petitioners constitutional challenge. Pet. App. 1-28. Under the rule laid down by the narrowest grounds for the majority,[1] the Court held Exhibit A was "potentially misleading to the least sophisticated consumer ... [because the least sophisticated consumer] could be misled into believing that it was a credit card statement for an account with Great Seneca that involved transactions that occurred on the date listed." Pet. App. 25-26.

The majority stated "whether and how much Rice and Hartman owe Great Seneca, are useful background but are ultimately irrelevant to the outcome of the cases." Pet. App. 3-6, 13. The court reversed "because we conclude that Hartman and Rice have raised a genuine issue of material fact as to whether Great Seneca's and Javitch's representations were misleading or deceptive...." Pet. App. 13.

As to the bona fide error defense, the majority reversed, holding that "[t]he error made by Great Seneca and Javitch was a mistake of law; they represented that Exhibit A was an account in a manner that could be found to be misleading or deceptive." Pet. App. 17. Addressing each of the three elements of the defense, the court held that the "extensively detailed" evidence did not establish the violation was unintentional, resulting from an error which was bona fide, or sufficiently show the maintenance of procedures reasonably adapted to

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[1] *Marks v. United States*, 430 U.S. 188, 193 (1977).

avoid "any such error." 15 U.S.C. §1692k(c). Pet. App. 17.

As to the constitutional issues, the Court of Appeals rejected the constitutional challenge in its entirety. First, the Court of Appeals observed that *Heintz v. Jenkins*, 514 U.S. 291 (1995) reached the "clear conclusion that the FDCPA does apply to litigation-related activity. . . . The opposite conclusion, that the First Amendment prohibits FDCPA suits based on statements made during judicial proceedings, would negate the Supreme Court's holding that the FDCPA "does apply to lawyers engaged in litigation." *Heintz*, 514 U.S. at 294. Pet. App. 18-24.

Second, the Court observed that assuming the First Amendment did afford some protection to statements made during judicial proceedings, it would not protect the Petitioners for an "allegedly false statement." Pet. App. 22.

Third, the Court held that the bona fide error defense was constitutionally sufficient because literally true but "misleading [representations] would be protected from liability by the BFE defense if the collector could show that the mistake was unintentional, made in good faith, and that the collector had procedures to avoid such a mistake." Pet. App. 22-23.

The Court declined to address the Petitioners claim that substantive due process prohibited a finding of liability because "a provision of the Constitution directly addresses the type of illegal governmental conduct alleged . . . ." Pet. App. 23-24.

Finally, the Court rejected the Petitioners' argument that the commerce clause did not permit Congress to regulate state court judicial procedure. Pet. App. 24.

Judge White separately dissented. Applying the least sophisticated consumer standard, Judge White observed: "I cannot agree that the use of these statements of account would mislead the least sophisticated consumer into believing that he or she incurred a recent debt by use of a credit card issued by Great Seneca." Pet. App. 26-28.

REASONS FOR GRANTING THE WRIT

This case raises the issue of when litigation may be found to violate federal law, with respect to the FDCPA. According to the Sixth Circuit, the FDCPA permits the imposition of strict liability for representations in pleadings that are not objectively baseless, and contain no material false representation, irrespective of improper motive, whenever such pleadings have the potential to mislead. The First Amendment and federalism concerns prevent exposure to liability for filing a lawsuit having a reasonable basis in law and fact. The Sixth Circuit's decision fails to protect petitioning which is objectively and subjectively genuine or recognize the "chilling effect" on First Amendment petitioning caused by exposure to damages under the FDCPA for petitions having the mere potential to mislead. The decision is incompatible with the core principles and ideals in the First Amendment and this Court's precedent, and cannot be allowed to stand.

Further, the Court's holding creates an impossible standard to comply with. The undefined, ambulatory and standardless prohibitions contained in 15 U.S.C. § 1692e and § 1692f have vested the courts with unbridled discretion to decide what complies with the law and what doesn't. The

divergent views expressed by the district court and the plurality on what a consumer might think about Exhibit A (p. 9, supra), evidences the urgent need for this Court's guidance and supervisory powers. Whether evidence of consumer confusion is required in FDCPA cases involving literally true but potentially misleading representations is an issue that has divided the circuits.. Review of this case would allow the court to determine what role evidence plays in assessing claims of consumer confusion and resolve the circuit conflict.

Whether the bona fide error defense under 15 U.S.C. § 1692k(c) includes legal errors at all is an open question, with the issue pending on review before this Court. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, S.Ct. Case No. 09-1200, reviewing 538 F.3d 469, 476 (6th Cir. 2008). Review of this case would permit the Court to consider the constitutional need for a robust, 'error in legal judgment' inclusive construction of the FDCPA's bona fide error defense, and whether evidence showing the Petitioners acted in good faith and reasonably under the circumstances, is sufficient to satisfy the requirements of the bona fide error defense, in light of the nature of the claims made here.

I. Review Is Required To Determine Whether The Application Of 15 U.S.C. §§ 1692e, 1692e(10) and 1692f Literally True But Potentially Misleading Representations In Pleadings Violates The Constitution.

A. The Pleadings Are Not Beyond First Amendment Protection.

Imposing strict liability on debt collectors for literally true but potentially misleading

representations in pleadings under the FDCPA is incompatible with this Court's First Amendment jurisprudence and the common law. Even if collecting a debt could be construed as synonymous with litigation, the First Amendment counsels against that construction. U.S. Const. amend. I. The character of a statement and whether it is beyond the protection of the First Amendment is a question of law over which this Court exercises de novo review. *Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 496 U.S. 91, 108 (1990).

1. Petition clause jurisprudence does not recognize an exception from qualified immunity for *every* potentially misleading statement. See e.g. *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1186 (9th Cir. 2005); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931-33 (9th Cir. 2006). Rather, "liability rests on deceits perpetrated with knowledge of their falsity." *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1123-24 (D.C. Cir. 2009); *Kearney v. Foley & Lardner, LLP*, 582 F.3d 896, 906 (9th Cir. 2009). The pleadings at issue here enjoy protection under the First Amendment Right to Petition because they were not objectively baseless, nor motivated by an improper purpose, and contain no intentional misrepresentation. *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002); *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993); *McDonald v. Smith*, 472 U.S. 479, 484 (1985); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). "[A]n objectively reasonable effort to litigate cannot be sham regardless of subjective intent." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 57.

One may be deprived of *Noerr-Pennington* immunity only when evidence shows that a "party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy[;]" not when the litigation was commenced with an improper motive. *Liberty Lake Investments, Inc. v. Magnuson*, 12 F.3d 155, 158-59 (9th Cir. 1993); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 68 F.3d 119, 123-24, 27 (3d Cir. 1999); *Baltimore Scrap Corp. v. The David J. Joseph Co.*, 237 F.3d 394, 399-401 (4th Cir. 2001); *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1185, n. 2 (9th Cir. 2005). No such evidence was presented here.

2. Even assuming that the pleadings should be evaluated as commercial speech, this does not justify the exposure to liability and the loss of First Amendment protection for filing an accurate, literally true pleading that has the potential to mislead. *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 144 (1994). The First Amendment interests at stake here should not be lost by the mere talismanic invocation of the word misleading.

3. Under the First Amendment, "speakers are protected from arbitrary and discriminatory enforcement of vague standards." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998). A statute implicating the rights protected by the First Amendment will be invalidated under the void for vagueness doctrine "if its prohibitive terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Not only do "[v]ague laws ... trap the innocent by not providing

fair warning," but laws that fail to provide explicit standards guiding their enforcement "impermissibly delegate[ ] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford,* 408 U.S. 104, 108-109.

Because the broad statutory text of 15 U.S.C. §§ 1692e, 1692e(10) and 1692f do not expressly apply to the content of state court pleadings, and the standard employed vests too much discretion in judges to decide what violates the law, applying the statutes to pleadings is arbitrary and capricious, and chills the exercise of the right to petition and access to the courts. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988).

4. Even if the Court of Appeals was correct in sending this case to the jury, "juries, not judges, decide disputed questions of fact even when First Amendment immunity is at issue", and the constitutional issue must also be submitted to the jury. *Personnel Dept., Inc. v. Professional Staff Leasing Corp.*, 297 Fed.Appx. 773, 779-781, 781, 2008 WL 4698479, 7, 6-10 (10th Cir. 2008); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 746 (1983); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 668 (1994).

5. Common law recognized that lawyers and their clients could not be subject to suit for pertinent statements made in the course of judicial proceedings. *Burns v. Reed*, 500 U.S. 478, 490 (1991); *J & J Const. Co. v. Bricklayers and Allied Craftsmen, Local 1,* 468 Mich. 722, 735-55, 664 N.W.2d 728 (2003). The legislative history of the FDCPA does not reflect any consideration by Congress of the common

law litigation privilege. Therefore, no intent to abrogate the common law litigation privilege can be inferred. As such, "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'" *United States v. Texas*, 507 U.S. 529, 534 (1993). No such purpose is present here. The underlying purpose of the common law immunity is to afford the participants "breathing room" to speak without fear of reprisal, so that the court can determine what the truth is. *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983). The tripartite purposes of the FDCPA include, protecting consumers from abusive debt collection practices, establishing a level playing field for debt collectors, and promoting consistent state action. 15 U.S.C. § 1692(e).

Because the two have a consistent purpose, recognition of the litigation privilege for literally true pleadings would be consistent with the common law, the purpose of the legislation and the First Amendment.

B. The Circuits Are Divided Over Whether Least Sophisticated Consumer Standard Under The FDCPA For Literally True But Potentially Misleading Representations Requires Evidence Of Consumer Confusion To Create A Genuine Issue Of Material Fact Requiring A Jury Trial.

Federal courts are irreconcilably divided on whether least sophisticated consumer standard under the FDCPA for literally true but potentially misleading statements is always question of law, always a jury question, or requires evidence of

consumer confusion to create a genuine issue of material fact requiring a jury trial. This case presents an ideal opportunity for this Court to resolve the conflict, which was both squarely raised below and outcome-determinative in the Sixth Circuit's decision. Not only are the circuits irreconcilably divided, but the Sixth Circuit's decision is also wrong on the merits and frustrates the purpose and operation of the FDCPA.

1. The Second, Third and Ninth Circuits consider the issue a question of law because an objective assessment of the communication at issue is performed by the Court. See *Shapiro v. Dun & Bradstreet Receivable Mgmt. Servs., Inc.*, 59 F. App'x 406, 407-08 (2d Cir.2003); *Wilson v. Quadramed Corp.*, 225 F.3d 350, 353 n.2 (3d Cir.2000); *Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir.1997). The Fifth and Sixth Circuits require a jury to determine whether the communication violates the Act in any case where the document could be read in more than one way, at least one of which is inaccurate. *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 441 (6th Cir. 2008); *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir.2009). The Seventh Circuit requires evidence of consumer confusion in all but the clearest cases, to demonstrate a genuine issue of material fact requiring a trial. *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1060 (7th Cir.1999); *Ruth v. Triumph Partnerships*, 577 F.3d 790, 799-804 (7th Cir. 2009).

2. Petitioners submit that the Seventh Circuits approach is most consistent with the First Amendment interest in protecting speech that matters. Compare *Ruth v. Triumph Partnerships*, 577 F.3d 790, 804 with *Wilhelm v. Credico, Inc.* 519 F.3d 416, 421 (8th Cir. 2008); *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1177 (9th

Cir. 2006); *Beck v. Maximus, Inc.*, 457 F.3d 291, 298-99 (3d Cir. 2006); *Russell v. Equifax A.R.S.*, 74 F.3d 30, 34-36 (2d Cir.1996).

3. The only evidence offered by Respondents to make out the claim of confusion were the state court complaints and their attachments. Respondents did not rebut Petitioners evidence that no one, including Respondents, ever claimed to be confused, deceived or misled by the use of the account statement. On summary judgment, where the Plaintiff bears the burden of proof, no genuine issue of material fact requiring trial is made out on the bare allegations contained in the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). If a party is unable to make a sufficient showing as to some essential element of its case, upon which it bears the ultimate burden of proof at trial, all other facts are necessarily immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23. The non-moving party must, if he does respond, come forward with sufficient evidence to allow a reasonable trier of fact to find in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251. The presence of some metaphysical doubt about what consumers might think is insufficient to create a triable question of fact for a jury. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

4. There were no genuine issues of material fact in dispute here; thus, there is nothing to try before a jury. Evidence of consumer confusion should be required in all but the clearest cases, to demonstrate a genuine issue of material fact requiring a trial. *Ruth v. Triumph Partnerships*, 577 F.3d 790, 799-804. Because there was no such evidence in this case, summary judgment should have been rendered in favor of Petitioners.

In light of the First Amendment interests at stake, Petitioners urge the Court to review this case to determine whether evidence of consumer confusion is constitutionally required under the FDCPA for literally true but potentially misleading representations.

C. The Decision Below Reflects Widespread Uncertainty Over the Meaning of *Heintz v. Jenkins*, Which This Court Alone Can Dispel.

This case also concerns the continuing vitality of this Court's decision in *Heintz v. Jenkins*, 514 U.S. 291 (1995). As a consequence of a pervasive misreading of this Court's holding in *Heintz v. Jenkins*, significant "anomalies" have developed in the application of the FDCPA to litigation which this Court in *Heintz* predicted lower courts were unlikely to endorse. The time is ripe for the Court to clarify that *Heintz* did not establish the caustic proposition that strict liability is constitutionally permitted under the FDCPA whenever a pleading has the potential of being misread by a hypothetical consumer.

1. Courts have reasoned that since *Heintz v. Jenkins* found the Act contained no implied exception for litigation, by necessity, all litigation is regulated by the FDCPA, subject only to the bona fide error defense. *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 230-31 (4th Cir. 2007); *Medialdea v. Law Office of Evan L. Loeffler PLLC*, Unreported Case No. No. C09-55RSL, 2009 WL 1767185, 6, n. 4. (W.D.Wash. June 19, 2009). In other words, by suggesting that debt collection was synonymous with litigation, Courts have consistently read *Heintz* to mean Courts

were required to apply the FDCPA to all litigation engaged in by debt collectors.

2. There is however, substantial evidence in the legislative history supporting the view that Congress did not intend the FDCPA to apply to litigation at all and that it understood that debt collection was not synonymous with litigation. The first draft of Congressional legislation regulating false and misleading debt collector representations, prohibited among other things "falsely representing or falsely implying any facts about the character, extent or amount of an alleged debt of a consumer or of its status ***in any legal proceeding***." H.R. 10191 § 804(6), 94th Cong. 1st Sess. (1975)(emphasis added). As enacted, the FDCPA prohibition extends only to the false representation of "the character, amount, or legal status of any debt." 15 U.S.C. §1692e(2)(A). If Congress intended 15 U.S.C. §1692e to apply to legal proceedings, it could have left this clause in the statute, or defined the term "debt collection" to include litigation. Its omission compels the opposite conclusion. *TRW Inc. v. Andrews,* 534 U.S. 19, 28 (2001).

The 1986 amendment to the Act was prompted by concerns that non-litigating attorneys were unfairly competing with lay debt collectors. H.R. Rep. No 99-405, 1986 U.S.C.C.A.N. 1752; Hearings on H.R. 237, to Amend the Fair Debt Collection Practices Act, Before the Subcommittee on Consumer Affairs and Coinage of the Committee on Banking, Finance & Urban Affairs pp 1-3, 6, (October 22, 1985), pp. 1-3 (comments of Chairman Annunzio); pp. 11-22 (statement of Ann Fortney, FTC); pp.30-44 (statement of American Collectors Assn.); pp. 162-72 (comments of committee members John Hiler, Bruce Morrison). The 1986 amendment was to remedy the

problem of attorneys entering "the debt collection business" claiming to be exempt from the restrictions imposed on non-lawyer debt collectors. H.R. Rep. No 99-405, 1986 U.S.C.C.A.N. 1752, 1752-54. See *Dutton v. Wolpoff & Abramson,* 5 F.3d 649, 655 (3d Cir.1993).

3. Amendments to the Act after *Heintz* was decided supports the view that the FDCPA was not intended to apply to litigation. The only two affirmative disclosure requirements in the Act appeared in 15 U.S.C. § 1692e(11) and § 1692g; yet, both sections were amended to make clear that the Act does not apply to pleadings in litigation. An amendment was made in 1996 to § 1692e(11) to exempt pleadings from the subsequent disclosure requirements under that section. Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub.L. 104-208, Title II, § 2305(a), 110 Stat. 3009-425 (1996). In 2006, Congress again amended the Act to expressly provide that pleadings were not communications under § 1692g, to resolve a circuit conflict. Financial Services Regulatory Relief Act of 2006, Pub.L. 109-351, Title VIII, § 802, 120 Stat. 2006 (2006)(amending 15 U.S.C. § 1692g(d)(2006)). *Goldman v. Cohen,* 445 F.3d 152, 157 (2d Cir. 2006); *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir. 2004); *Vega v. McKay*, 351 F.3d 1334, 1337 (11th Cir. 2003). The Amendment was intended to make clear that "a formal pleading in any civil action will not be considered communications now as defined by the FDCPA." 152 Cong. Rec. H7573-01, H7588 (Remarks of Rep. Garrett) (9-27-06) (consideration of Financial Services Regulatory Relief Act of 2006, PL 109-351, 120 Stat. 1966, § 802, effective October 13, 2006). In light of the 2006 amendment, "it is far from clear that the FDCPA

controls the contents of pleadings filed in state court." *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 473 (7th Cir. 2007).

Thus, even if litigation could be construed to fit within the plain language of the Act, it cannot be regulated by the Act because doing so is "not within its spirit nor within the intention of its makers." *Muniz v. Hoffman*, 422 U.S. 454, 469 (1975) (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)).

4. *Heintz v. Jenkins* cannot be read as a *sub silentio* constitutional holding endorsing the position taken by the Sixth Circuit. Pet. App. 19-21. Plainly, the constitutionality of the FDCPA as applied to litigation is not foreclosed by *Heintz v. Jenkins*. See *F.C.C. v. Fox Television Stations, Inc.*, __ U.S. __, 129 S.Ct. 1800, 1812, 1819 (2009); *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *Webster v. Fall*, 266 U.S. 507, 511 (1924).

Petitioners suggest this Court adopt a limiting construction of 15 U.S.C. § 1692e and § 1692f Act to avoid the constitutional questions raised here. *SKF USA, Inc. v. U.S. Customs and Border Protection*, 556 F.3d 1337, 1352-60 (Fed. Cir. 2009).

D. Review Is Required To Assess Whether 15 U.S.C. § 1692e And § 1692f Violate Substantive Due Process.

This case also epitomizes the arbitrary, capricious and unreasonable application of the FDCPA. Of the four judges reviewing the documents at issue, two concluded they were not misleading at all, one expressed the view that they were potentially misleading and the fourth, that it was for a jury to determine. If the Courts and judges can't agree on

what violates the law, how are debt collectors expected to comply with it?

1. The standard used by the majority to assess the pleading's attachment was arbitrarily applied, by ignoring the term "assignee" appearing on the form, which the Court characterized as "a legal term that would not necessarily help the least sophisticated consumer understand the relationships between the parties listed." Pet. App. 14. Compare with *Sprint Communications Co., L.P. v. APCC Services, Inc.*, __ U.S. __, 128 S.Ct. 2531, 2541-42 (2008). Both the dissent and the district court found the presence of that term on the form dispositive, and construed it in accordance with its ordinary meaning. Pet. App. 27, 44-45. The document was entitled to be construed as a whole, in accordance with the ordinary meaning of terms used. *Wahl v. Midland Credit Management, Inc.*, 556 F.3d 643, 646 (7th Cir. 2009); *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 594 (6th Cir. 2009); Cf. *Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283 (1974). Turning a blind eye to the language employed was arbitrary, capricious and unreasonable.

2. The FDCPA "fails to meet the requirements of the Due Process Clause ... [because] it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits...." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)(quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966)); U.S. Const. amend. V.

Where cases involving identical facts can be decided in two different courts and the outcome is not the same, the explanation for the different outcome can only be attributed to capriciousness. Compare e.g. *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412

F.3d 360 (2d Cir. 2005) with *Gonzalez v. Kay*, 577 F.3d 600, 607-12 (5th Cir. 2009) (Jolly, J. dissenting).

E. Review Is Required To Assess Whether 15 U.S.C. § 1692e And § 1692f Violate The Commerce Clause.

The decision also upsets the balance of power between the federal government and the states over their courts and regulation of the practice of law in an area of traditional state concern, where adherence to state pleading and practice rules is no longer sufficient to avoid liability under federal law. Although there is no question that debt collection affects interstate commerce, the application of the FDCPA to police state court judicial proceedings represents an unheralded departure from the history and tradition of allowing states to manage their own courts and the practice of law.

1. The content of state court pleadings and regulating the practice of law, are areas traditionally recognized as falling within the ambit of state concern. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992). Throughout the history of the Nation, the states and not the federal government, have regulated the practice of law and have their own court rules and procedures for adjudicating suits and rendering judgment. Nothing appears in the legislative history of the FDCPA supporting the view that Congress intended the FDCPA to regulate the content of state court pleadings or state court litigation and to convert Ohio Civ. Rule 11 into a strict liability standard.

2. The Sixth Circuit held the limit of Congressional authority under the Commerce clause

is not implicated in this case. Pet. App. 24; U.S. Const. art. I, § 8, cl. 3 If adherence to state standards results in liability under federal standards, there can't be any serious disagreement that the application of the FDCPA in this case has a substantial effect on state law. Congress does not have the power "to effect [a] serious and fundamental restriction on advocacy of attorneys." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 534 (2001). Further, Congress has not taken upon itself the authority to determine the how lawyers must plead suits to protect consumers, thereby infringing on the state's traditional role of regulating attorneys. See *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

3. In this case, the Ohio Supreme Court defined the form and content of pleading an action on an account, which was adhered to by Petitioner JB&R. See Ohio Civ.R. 84 & Ohio Civ.R. Form 3. The standard to which a lawyer must comply with when filing suit is set forth in Ohio Civ.R. 11, not the FDCPA. Ohio law provides consumers with the ability to challenge claims made against them in court; indeed, "[t]he right to sue and defend in the courts is the alternative of force." *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907).

4. Contrary to the assessment of the panel, the Ohio Supreme Court has held, "there is no language in Ohio Civ.R. 10(D)(1) that the account or written instrument is required to establish the adequacy of the complaint." *Fletcher v Univ Hosp.*, 120 Ohio St.3d 167, 170 (2008). Likewise, Ohio Appellate Courts have ruled that "[Ohio Civ.] Rule 10(D)(1) does not require a plaintiff to attach "a complete copy of the account" ..., nor does it require a creditor to attach a copy of every statement issued to the

borrower." *Capital One Bank v. Nolan*, 2008-Ohio-1850, 2008 WL 1758892, 3 (4th Dist. App. 2008).

II. Review Is Required Because The Availability Of The FDCPA's Bona Fide Error Defense In This Case Depends On The Outcome Of *Jerman v. Carlisle, Mcnellie, Rini, Kramer & Ulrich, LPA*, Case No. 08-1200.

In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 538 F.3d 469 (6th Cir. 2008), the Sixth Circuit followed the Seventh and Tenth Circuits, holding that the FDCPA's bona fide error defense, 15 U.S.C. §1692k(c), includes errors of law a debt collector makes which fail to comply with the FDCPA. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 538 F.3d 469, 473-74 (citing *Johnson v. Riddle*, 305 F.3d 1107 (10th Cir. 2002); *Nielsen v. Dickerson*, 307 F.3d 623, 641 (7th Cir. 2002)). See also *Ruth v. Triumph Partnerships*, 577 F.3d 790, 804 (7th Cir. 2009). The Court also cited holdings from the Second, Eighth, and Ninth Circuits holding that the bona fide error defense does not apply to legal errors. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 538 F.3d 469, 474-76 (citing *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir.2001); *Hulshizer v. Global Credit Servs., Inc.*, 728 F.2d 1037, 1038 (8th Cir.1984); *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir.1989); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir.1982). This Court granted certiorari to resolve the circuit conflict. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 129 S.Ct. 2863, 174 L.Ed.2d 575, Case No. 08-1200.

1. In contrast to the legal uncertainty resulting in a bona fide error at issue in *Jerman*, this case

involves the complete absence of federal precedent and regulatory guidance defining the proper format and information required to be set forth in a purchased debt creditor's account record and pleading. Moreover, while the validation notice in issue in *Jerman* involved a form of commercial speech, *Jerman* did not address any of the constitutional issues raised here. The framework for assessing whether a good faith unintentional error should excuse in *Jerman*, must be consistent with the constitutional interest in protecting speech that matters. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993); *Peel v. Attorney Disciplinary Comm'n of Ill.*, 496 U.S. 91, 111 (1990); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

2. As noted by the District Court, in 2003, there was no "FDCPA case law supporting [the] contention that ... a procedural challenge to a state court pleading-i.e., the failure to attach all of the original creditor's documents-violates 15 U.S.C. §§ 1692e, 1692e(10) or 1692f." Pet. App. 39-40. The bona fide error defense is available when a debt collector "violates the act in any manner, including with regard to the act's coverage" when the violation was "unintentional and occurred despite procedures designed to avoid such violations." S.Rep. 95-382, p. 5. The District Court held Petitioners offered unrebutted evidence that they did not intend to violate the FDCPA; that Great Seneca followed existing case law, engaged a specialized law firm responsible for maintaining compliance with the FDCPA; that JB&R was entitled to rely on its client's representation and had no duty under the FDCPA to independently investigate the claims presented for

collection and acted reasonably under the circumstances. Pet. App. 46-48.

3. Reversing, the Court of appeals held Petitioners had not shown what procedures were used to avoid violating the FDCPA for literally true but potentially misleading business records used to support lawsuits; had not shown what procedures were used to ensure that mistakes of law did not occur; had not shown ongoing FDCPA training, procuring and reviewing the most recent case law, or continuing compliance with the FDCPA. Pet. App. 15-18. The Court of Appeals implicitly found that the absence of any precedent was insufficient to qualify for the bona fide error defense in this case, because Petitioners were required to show that "they employ procedures meant to avoid mistakes of law that could cause FDCPA violations." Pet. App. 18.

4. Petitioners propose that an objective test, considering what was reasonable to believe at the time and under the circumstances, would be a proper test for demonstrating the existence of a good faith unintentional error in any case involving a factual or legal error. See e.g., *Charbonneau v. Mary Jane Elliott, P.C.*, 611 F.Supp.2d 736, 743 (E.D. Mich. 2009); *Kirk v. Gobel*, 622 F.Supp.2d 1039, 1049 (E.D.Wash. 2009); *Castro v. Collecto, Inc.*, Unreported Case. No. EP-08-CA-215-FM, 2009 WL 3617557 *23-24 (W.D.Tex. Oct. 27, 2009).

In making the determination in this case, a reasonable person in Petitioners' position would not have known or have been able to predict how the Sixth Circuit would rule in this case, and had no reason in 2003 to employ specific procedures used to avoid violating the FDCPA for literally true but potentially misleading business records used to support lawsuits. It would be improper to expose

Petitioners to money damages for failing to predict the outcome of this case. *Pearson v. Callahan*, 129 S.Ct. 808, 822 (2009); compare with *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

A. 15 U.S.C. § 1692k(c) Is Unconstitutional As Applied To Literally True But Potentially Misleading Representations In Pleadings.

Filing a suit supported by probable cause, that is not objectively baseless, contains no materially false representations, and brought in good faith based on a client's representation that a debt is owed, is protected under the First Amendment. *McDonald v. Smith*, 472 U.S. 479, 484 (1985); *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983); *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002). These types of expression retain protection under the First Amendment until there is a heightened showing of intent, falsity or recklessness, before liability can be imposed, to prevent a chilling effect on protected, truthful, speech. See e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *Herbert v. Lando*, 441 U.S. 153, 156-57 (1979); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

1. Even when the speech at issue involves private parties and a matter of purely private concern, liability cannot be presumed; a showing of intent, falsity or recklessness, must be proven by the Respondents. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-47 See also e.g., *J & J Const. Co. v.*

Bricklayers and Allied Craftsmen, Local 1, 468 Mich. 722, 735-55, 664 N.W.2d 728, 735-45 (2003).

2. Exposing Petitioners to strict liability for engaging in protected petitioning activity cannot be avoided by affording petitioners a bona fide error defense limited to clerical errors. Further, if the bona fide error defense does not protect a "lawyer who commits an unintentional violation of the FDCPA by asserting in good faith a claim that is later rejected by a court, it would undermine the holding in *Heintz v. Jenkins.*" *Taylor v. Luper, Sheriff & Niedenthal Co., L.P.A.*, 74 F.Supp.2d 761, 765 (S.D.Ohio 1999). Likewise, placing the burden of proof on the Petitioners to demonstrate why strict liability should not attach, reduces the First Amendment and the Right to Petition to a meaningless platitude.

As construed by the Court of Appeals, 15 U.S.C. § 1692k(c) does not afford any breathing room for protected petitioning activity and inadequately addresses the competing values at stake. ***BE & K Const. Co. v. N.L.R.B., supra.*** Measured against the requirements of the First Amendment, the FDCPA's bona fide error defense is constitutionally infirm when applied to protected communications and conduct, because the burden of proof is placed on the debt collector and because there is no requisite heightened showing of falsity or intent. *Gertz v. Robert Welch, Inc.*, supra; *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U .S. 731, 742-44.

3. Even if the Court concludes in *Jerman* that the bona fide error defense applies to legal errors, review in this case would permit the Court to define the constitutional requirements when the FDCPA is applied to litigation, and to address the competing interests at stake for claims premised on literally true but potentially misleading statements made in

pleadings. Compare *Taylor v. Luper, Sheriff & Niedenthal Co., L.P.A.*, 74 F.Supp.2d 761, 765, with *Ruth v. Triumph Partnerships*, 577 F.3d 790, 804-5 (7th Cir. 2009).

III. The Sixth Circuit's Decision Is Wrong On The Merits.

This Court also should grant certiorari because the Sixth Circuit's decision is wrong on the merits. The Court of Appeals read the prohibitions against false or misleading representations and unfair practices in 15 U.S.C. §§ 1692e, 1692e(10) and 1692f as applicable to litigation. However, the words "in litigation" do not appear in the statutory text. Further, the word "misleading" only appears in the general prohibition contained in 15 U.S.C. § 1692e.

A. A Potentially Misleading Statement In Litigation By A Debt Collector Is Not Actionable Under 15 U.S.C. §§ 1692e, 1692e(10) Or 1692f.

The only view that debt collection, and as pertinent here, the phrases "collection of any debt" as used in § 1692e, and "to collect or attempt to collect any debt" used in § 1692e(10) and § 1692f include litigation, appears in *Heintz v. Jenkins*, dicta, discussed *supra*.

1. The rule of *ejusdem generis* applicable to statutes containing a series of enumerations followed by a general enumeration, is equally applicable to a statute containing a general prohibition followed by specific enumerations. 2A Sutherland Statutory Construction § 47:17 (7th ed. 2008). 15 U.S.C. §§ 1692e and 1692f share a similar structure in that they both contain a general prohibition followed by enumerated examples of prohibited conduct; Section

1692e contains sixteen enumerated examples and Section 1692f contains eight examples. Read this way, the phrase "[w]ithout limiting the general application of the foregoing" must be informed by the specific examples of conduct delineated in the examples. *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470, 474-75 (7th Cir. 2007); *Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1175 (9th Cir. 2006). None of the enumerated examples in 15 U.S.C. §§ 1692e(1)-(16) or 1692f(1)-(8) expressly or impliedly include a potentially misleading account statement attachment to a pleading.

2. Among the sixteen subsections of 1692e, the word "misleading" appears in none of the subsections. Eleven subsections refer to false representations – 1692e(1), (2), (3), (6), (7), (9), (10), (12), (13), (15) and (16). These subsections should be construed to provide examples of the conduct or communications amounting to a "false representation." Sutherland, *supra*; H.R.95-131, p. 13; S.R. 95-382, p. 8. "'Misleading' is similar to 'deceptive,' except that it can be innocent; one intends to deceive, but one can mislead through inadvertence." *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769, 775 (7th Cir. 2007). Of the remaining subsections, three subdivisions relate to deceptive representations (1692e(4), 1692e(5), 1692e(8)) because they denote a degree of intent, and two relate to misleading representations (1692e(11) and 1692e(14)) because they relate to omissions.

3. 15 U.S.C. § 1692e(10) was intended to prohibit debt collectors from using false pretenses to obtain information concerning a consumer. *Bernstein v. F.T.C.*, 200 F.2d 404, 405 (9th Cir. 1953); *Floersheim v. F.T.C.*, 411 F.2d 874, 877 (9th Cir.

1969); 16 C.F.R. § 237.1 (1973), repealed 60 Fed.Reg. 40263-01 (1995); .S. REP. 95-382, 1977 U.S.C.C.A.N. 1695, 1696, 1698. Some courts have erroneously read subsection 1692e(10) as a catchall clause by truncating the sentence, inserting a period after the word "debt" and ignoring the last clause which refers to obtaining "information concerning a consumer", to support the conclusion that § 1692e(10) is "particularly broad and encompasses virtually every violation, including those not covered by the other subsections." Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50097, 50105 (December 13, 1988). See e.g. *Rosenau v. Unifund Corp.*, 539 F.3d 218, 224 (3d Cir. 2008).

As there was no false representation or deceptive means "to obtain information concerning a consumer" under § 1692e(10), the Court of Appeals erred in reversing on these claims.

4. Among the eight subsections of 1692f, there is neither any reference to statements made in pleadings or to potentially misleading statements made during the course of litigation. *Beler*, 480 F.3d 470, 473. As such, the Court of Appeals erred in reversing these claims.

5. Read as a whole and attributing the ordinary meaning to the term assignee appearing on the account statement, there is no potential to mislead. Pet. App. 26-28, 42-45.

IV. The Issues Presented are Recurring and of Great Practical Importance.

The importance of this case to the U.S. economy, banking industry, debt buying market, and lawyers engaged in litigation is substantial. According to the Federal Reserve, outstanding

consumer credit on revolving accounts exceeded 911 billion dollars at the close of the second quarter, 2009.[2] The charge-off rate for credit card debts, that is, the percentage of accounts charged to bad debt, is currently at 9.55%.[3] As recently noted by the General Accountability Office:

> "To recover delinquent debt, credit card issuers use a combination of methods, including ... collection attorneys, and the sale of debt to a debt buyer. The debt collection industry recovers and returns to card issuers and other creditors billions of dollars in delinquent debt each year that would otherwise go uncollected. These efforts increase the availability of consumer credit and reduce its cost."

United States Government Accountability Office, Credit Card Debt Collection Report #GAO-09-748 (9-09).[4] The sale of bad debts to debt buyers has a multi-billion dollar effect on the U.S. economy. Id. at p. 7 (p. 11/66). With over 100 U.S. banks failing this year,[5] the ability of banks to sell these debts will be diminished as a result of the substantial risk posed to debt buyers who attempt collection through litigation, if the decision is allowed to stand. Every debt that is sold to a debt buyer who attempts to collect through litigation would have the same potential to mislead as presented in this case.

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[2] See http://www.federalreserve.gov/releases/g19/Current/ (visited on 11-4-09).

[3] See http://www.federalreserve.gov/releases/chargeoff/chgallsa.htm (visited on 11-4-09).

[4] Reprinted online at http://www.gao.gov/new.items/d09748.pdf (visited 11-4-09)

[5] http://www.fdic.gov/bank/individual/failed/banklist.html (visited 11-4-09).

Because the FDCPA does not expressly address what account information should be provided when litigation is commenced, and the FTC has no regulatory authority under the Act, the task of defining what is deceptive, misleading or unfair has fallen on the Courts. Id. at pp. 26-30, 44-47.

How debt buyers and their lawyers can collect these debts in litigation in compliance with the FDCPA is of national importance.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, Petitioners request the Court defer action on this petition pending a decision in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, S.Ct. Case No. 09-1200.

Respectfully Submitted,

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November 12, 2009

United States Court of Appeals,
Sixth Circuit.
Delores HARTMAN (08-3773); Deborah L. Rice (08-3804), Plaintiffs-Appellants,
United States of America, Intervenor,
v.
GREAT SENECA FINANCIAL CORP.; Javitch, Block & Rathbone, LLP, Defendants-Appellees.
Nos. 08-3773, 08-3804.

Argued: March 13, 2009.
Decided and Filed: June 30, 2009.
Rehearing and Rehearing En Banc Denied Sept. 22, 2009[FN*]

FN* Judge White would grant rehearing for the reasons stated in her dissent.

Before: MOORE and WHITE, Circuit Judges; OLIVER, District Judge. [FN*]

FN* The Honorable Solomon Oliver, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

ARGUED: Stephen R. Felson, Law Office, Cincinnati, Ohio, for Appellants. Michael D. Slodov, Javitch, Block & Rathbone LLP, Cleveland, Ohio, for Appellees. Howard S. Scher, United States Department of Justice, Washington, D.C., for Intervenor. **ON BRIEF:** Stephen R. Felson, Law Office, Cincinnati, Ohio, Steven C. Shane, Bellevue, Kentucky, for Appellants. Michael D. Slodov, Javitch, Block & Rathbone LLP, Cleveland, Ohio, for Appellees. Howard S. Scher, Michael S. Raab,

United States Department of Justice, Washington, D.C., for Intervenor.

MOORE, J., delivered the opinion of the court. OLIVER, D.J. (p. 18), delivered a separate concurring opinion. WHITE, J. (pp. 19-20), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Plaintiff-Appellant Delores Hartman ("Hartman") and plaintiff-appellant Deborah Rice ("Rice") appeal the district court's grant of summary judgment in favor of defendants-appellees Great Seneca Financial Corporation [FN1] ("Great Seneca") and Javitch, Block & Rathbone, LLP ("Javitch"). Hartman and Rice both had credit-card accounts with Providian National Bank on which they allegedly owe money. Providian sold their accounts to Unifund CCR Partners, who sold the debts to Great Seneca. With the help of its attorneys (Javitch), Great Seneca attempted to collect on the defaulted debts by filing collection complaints against Hartman and Rice in Ohio state court. In each of those complaints, Great Seneca and Javitch asserted that a copy of the debtor's "account" was attached to the complaint. In each case, the document that Great Seneca and Javitch attached as an "account" resembled a credit-card statement but had been generated on Great Seneca's behalf.

> FN1. We note that apparently Great Seneca has voluntarily dissolved. The effect of this action is discussed in Part II.E.

Hartman and Rice filed separate actions in the United States District Court for the Southern District of Ohio arguing that Great Seneca and Javitch violated the Fair Debt Collection Practices Act ("FDCPA") by representing, in their state-court complaints, that the document generated on Great Seneca's behalf was a statement of the debtor's account. The district court determined that there was no genuine issue of material fact as to whether this behavior violated the FDCPA and granted Great Seneca's and Javitch's motions for summary judgment in each case. Hartman and Rice appeal these judgments.

We **REVERSE** the district court's grant of summary judgment and **REMAND** the cases for proceedings consistent with this opinion. We also **REMAND** the question of whether Great Seneca should remain a party to this litigation, given its asserted voluntary dissolution.

I. BACKGROUND

The district court explained the facts surrounding Hartman's debt as follows:

> Plaintiff Hartman is a consumer who opened a credit card account with Providian National Bank on or about May 10, 2000, account number xxxxxxxxxxxx [yyyy]. Plaintiff received the terms and conditions of the credit card, which permitted transfer or assignment of right to payment. Plaintiff used the account from May 17, 2000 through March 20, 2001, at which time the account had an outstanding balance of $2,089.33.

> The account records indicate that final payment before charge off was made on February 9, 2001. The last fees were posted to the account in September 2001, with final balance being $2,565.81. The final statement before Plaintiff's account was sold, dated July 29, 2002 showed an unpaid balance of $2,551.30, after the posting of a $14.51 credit for a class action settlement benefit to her account.
>
> In February 2003, Providian National Bank sold Plaintiff's account to Unifund CCR Partners. Later that same month, Unifund sold the account to Defendant Great Seneca. With each sale, certain electronic information was transmitted, including the account number, name of the debtor, address, city, state, zip, phone, current balance, charge off date, charge off amount, last payment amount, last payment date, social security number, APR, account opening date, and an issuer flag for each account. Throughout this time, Plaintiff's account did not accrue additional fees and had an interest rate of 0%. In August 2003, Defendant [Javitch], on behalf of Defendant Great Seneca, sent a validation notice to Plaintiff. Plaintiff did not timely respond to the validation notice.

Hartman Dist. Ct. Op. and Order at 2.

The district court delineated the similar facts of Rice's case:

> Plaintiff Rice is a consumer who opened a credit card account with Providian National Bank on or about June 26, 2000, account number [zzzz].

> Plaintiff received the terms and conditions of the credit card, which permitted transfer or assignment of right to payment. Plaintiff used the account from July 25, 2000 through March 21, 2001, at which time the account had an outstanding balance of $1,994.88. The account records indicate that final payment before charge off was made on April 6, 2001. The last fees were posted to the account in November 2001, with final balance being $2,778.99. The final statement before Plaintiff's account was sold, dated January 28, 2003, reflected the $2,778.99 balance.
>
> In February 2003, Providian National Bank sold Plaintiff's account to Unifund CCR Partners. Later that same month, Unifund sold the account to Defendant Great Seneca. With each sale, certain electronic information was transmitted, including the account number, name of the debtor, address, city, state, zip, phone, current balance, charge off date, charge off amount, last payment amount, last payment date, social security number, APR, account opening date, and an issuer flag for each account. Throughout this time, Plaintiff's account did not accrue additional fees and had an interest rate of 0%. In August 2003, Defendant [Javitch], on behalf of Defendant Great Seneca, sent a validation notice to Plaintiff. Plaintiff did not timely respond to the validation notice.

Rice v. Great Seneca Fin. Corp., 556 F.Supp.2d 792, 795 (S.D.Ohio 2008). [FN2]

> FN2. The facts contained in these summaries are either undisputed or, like whether and

> how much Rice and Hartman owe Great Seneca, are useful background but are ultimately irrelevant to the outcome of the cases. Because we are reviewing the grant of summary judgment, we consider all facts and inferences in favor of Hartman and Rice. *Hamilton v. Gen. Elec. Co.*, 556 F.3d 428, 430 n. 1 (6th Cir.2009).

In October 2003, Javitch filed civil complaints in state court against Hartman and Rice on behalf of Great Seneca. The state-court complaint filed against Hartman read as follows:

1. There is due the Plaintiff from the Defendant upon an account, the sum of $2,551.30.

2. A copy of the said Account is attached hereto as "Exhibit A".

Hartman Ex. A to Am. Compl. The language of the state-court complaint filed against Rice is identical except that the amount owed is different. Javitch attached a financial document called "Exhibit A" to each of the complaints. In each case, Exhibit A was prepared by Great Seneca's law firm [FN3] and resembles a typical credit-card statement. Hartman Ex. B to Am. Compl.; Rice Ex. B to Am. Compl. In both cases, the document heading indicates that Exhibit A was produced by Great Seneca. The document includes the debtor's address and a space for her to change her address. It also contains an account number and indicates a new balance, $2551.30 for Hartman and $2778.99 for Rice, "DUE NOW." Hartman Ex. B to Am. Compl.; Rice Ex. B to Am. Compl. Below this general account

information are boxes for credit limit, credit available, amount past due, statement closing date, and a summary of transactions. The document also states that Great Seneca is the assignee of Unifund which is, in turn, the assignee of Providian. Hartman and Rice answered the complaints against them and served discovery. Great Seneca then dismissed the state-court actions against Hartman and Rice without prejudice.

> FN3. Great Seneca employed a law firm, Wolpoff & Abramson, to service its accounts. Wolpoff & Abramson, on behalf of Great Seneca, hired Javitch to collect debts owed in Ohio. Wolpoff & Abramson created the document in question.

After the state-court actions against them were dismissed, Hartman and Rice each filed an action in the United States District Court for the Southern District of Ohio alleging that Great Seneca and Javitch violated the FDCPA. Hartman and Rice argued that Great Seneca and Javitch acted in a false, deceptive, or misleading manner when they represented that Exhibit A, generated by Great Seneca, was an account statement. Hartman and Rice also alleged that this behavior violated the Ohio Consumer Sales Practices Act ("OCSPA"). In both cases, the plaintiffs moved for partial summary judgment, and the defendants moved for summary judgment. The United States filed briefs as an intervenor because Great Seneca and Javitch challenged the constitutionality of the FDCPA. Because of the similarity of the two cases, the district court judge in deciding Hartman's case adopted his *Rice* opinion.

The district court granted summary judgment in favor of Great Seneca and Javitch in both cases because it concluded that, as a matter of law, the least sophisticated consumer would have not have been confused or misled by the representation that Exhibit A was an account statement. Additionally, the district court found that, even assuming that there was an issue of material fact, Great Seneca and Javitch were protected by the FDCPA's bona-fide-error ("BFE") defense.

Hartman and Rice appeal the district court's grant of summary judgment in favor of Great Seneca and Javitch. Hartman and Rice first argue that Great Seneca's and Javitch's representation that Exhibit A to the state-court complaints was a copy of the debtor's account was false in violation of 15 U.S.C. §§ 1692e and 1692e(10). Second, they argue that presenting Exhibit A, which facially resembled a credit-card statement, as a copy of the debtor's account was deceptive and misleading in violation of §§ 1692e and 1692e(10) and an unfair means of debt collection under § 1692f. Finally, Hartman and Rice assert that the BFE defense does not protect Great Seneca and Javitch because this defense does not apply to mistakes of law and because Great Seneca and Javitch have not shown that they are entitled to the defense. Hartman and Rice also appeal the dismissal of their Ohio state-law claims, but concede that these claims stand or fall with their federal-law claims. Great Seneca and Javitch respond that their behavior did not violate the FDCPA and that in any event, they are entitled to the BFE defense. Additionally, Great Seneca and Javitch urge us to uphold the district court's

judgment on the alternate grounds that this application of the FDCPA is unconstitutional.

II. ANALYSIS

A. Standard of Review

We have explained the standard for reviewing a grant of summary judgment as follows:

> We review a district court's grant of summary judgment de novo. *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir.2007). "Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Fed.R.Civ.P. 56(c)). "Because we review the grant of summary judgment *de novo*, we may affirm the judgment on grounds other than those employed by the lower court, as long as the party opposing summary judgment is not denied the opportunity to respond." *Thornton v. Fed. Express Corp.*, 530 F.3d 451, 456 n. 2 (6th Cir.2008); *see also Nance v. Goodyear Tire & Rubber Co.*, 527 F.3d 539, 553 (6th Cir.2008).

Medical Mutual of Ohio v. k. Amalia Enters. Inc., 548 F.3d 383, 389 (6th Cir.2008).

B. Violation of the Fair Debt Collection Practices Act

Hartman and Rice assert that Great Seneca's and Javitch's behavior violates three provisions of the FDCPA: (1) 15 U.S.C. § 1692e, which provides that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt"; (2) § 1692e(10), which prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer"; and (3) § 1692f, which provides that "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." We have explained the concerns and standards applicable to FDCPA claims as follows:

> Congress enacted the FDCPA to eliminate "abusive, deceptive, and unfair debt collection practices." 15 U.S.C. § 1692(a). "When interpreting the FDCPA, we begin with the language of the statute itself." *Schroyer v. Frankel*, 197 F.3d 1170, 1174 (6th Cir.1999). As this court has noted, the FDCPA is "extraordinarily broad," crafted in response to what Congress perceived to be a widespread problem. *Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir.1992). Courts use the "least sophisticated consumer standard, an objective test, when assessing whether particular conduct violates the FDCPA. *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 329 (6th Cir.2006). This standard ensures "that the FDCPA protects all consumers, the gullible as well as the shrewd." *Kistner v. Law Offices of Michael P. Margelefsky, LLC.*, 518 F.3d 433, 438 (6th Cir.2008) (quotation marks and citations omitted). Nonetheless, the standard

> "also prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care." *Id.* at 438-39 (quotation marks and citations omitted).

Barany-Snyder v. Weiner, 539 F.3d 327, 332-33 (6th Cir.2008).

Ohio law requires that "[w]hen any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading." Ohio Civ. R. 10(D). The Ohio courts have explained this requirement as follows:

> It is elementary that in an action on an account, a plaintiff must set forth an actual copy of the recorded account. The records must show the name of the party charged and must include the following:
>
> (1) a beginning balance (zero, or a sum that can qualify as an account stated, or some other provable sum);
>
> (2) listed items, or an item, dated and identifiable by number or otherwise, representing charges, or debits, and credits; and
>
> (3) summarization by means of a running or developing balance, or an arrangement of beginning balance and items which permits the calculation of the amount claimed to be due.

Arthur v. Parenteau, 102 Ohio App.3d 302, 657 N.E.2d 284, 286 (1995) (internal citations and quotation marks omitted).

Because Great Seneca and Javitch sued Hartman and Rice in Ohio state court, they were subject to this requirement. In attempting to comply with this requirement, Great Seneca and Javitch did two things which form the basis of Hartman's and Rice's current claims. First, the state-court complaints alleged that Hartman and Rice owed Great Seneca money on an account and that "[a] copy of the said Account is attached hereto as 'Exhibit A.' " Hartman Ex. A to Am. Compl.; Rice Ex. A to Am. Compl. Second, Great Seneca and Javitch attached to each complaint, as Exhibit A, a document which had been generated at Great Seneca's behest. As described above, these documents facially resembled credit-card statements but were not actually copies of the Providian credit-card accounts on which Hartman and Rice were sued. Instead, these documents contained general information about the debt that had been transferred electronically from Providian to Unifund and then to Great Seneca.[FN4] Although these documents showed a final balance due, they did not contain a listing of debits and credits that had been made throughout the life of the account. Hartman and Rice assert that Great Seneca's and Javitch's representation that Exhibit A was a copy of the account on which they were being sued is false, deceptive, and/or misleading in violation of 15 U.S.C. §§ 1692e and 1692e(10) and is an unfair means of collecting a debt in violation of § 1692f.

FN4. Hartman and Rice assert that Great

> Seneca and Javitch generated these documents and made them look like a credit-card statement to evade Ohio's account statement requirement because it would cost them too much to get copies of the actual account statements. Further, Hartman and Rice allege that when a consumer questions the attached statement or asks for an actual statement, Great Seneca and Javitch dismiss their complaint against that consumer without prejudice.

Determining whether Great Seneca's and Javitch's representations regarding Exhibit A were false would require us to decide what "account" means under Ohio law. However, because we conclude that Hartman and Rice have raised a genuine issue of material fact as to whether Great Seneca's and Javitch's representations were misleading or deceptive, we hold that summary judgment is inappropriate regardless of whether the designation of Exhibit A as an "account" was false. Though Exhibit A identifies Great Seneca as an assignee of Unifund, and Unifund as an assignee of Providian, the document on the whole looks like a credit-card statement issued by Great Seneca. *See Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 440-41 (6th Cir.2008) ("Based on these conflicting aspects of the letter, we conclude that the district court erred in granting summary judgment to Margelefsky, but we will not go to the other extreme either by granting summary judgment to Kistner. Instead, a jury should determine whether the letter is deceptive and misleading...."). Exhibit A contains no information that would enable a consumer to

determine what had been charged to or paid on this account, or when the debt was accrued. The only language in the document indicating that Great Seneca is a debt collector is the word "assignee," a legal term that would not necessarily help the least sophisticated consumer understand the relationships between the parties listed. At this stage of litigation, Hartman and Rice do not need to establish that Exhibit A would definitely mislead the least sophisticated consumer. Instead, they need only show that there is a genuine issue of material fact as to whether Exhibit A would mislead the least sophisticated consumer. Given the fact that the document appears to be a recent credit-card bill, which it is not, and with few indications to the contrary, there is a genuine issue of material fact as to whether this document would mislead the least sophisticated consumer. Accordingly, summary judgment is improper.[FN5]

> FN5. This court's recent decision in *Miller v. Javitch, Block & Rathbone,* 561 F.3d 588 (6th Cir.2009), does not alter our analysis. Though Javitch is a party in both cases, the *Miller* court analyzed a different complaint and did not consider the issue before us.

Summary judgment is also improper on Hartman's and Rice's state claims under the OCSPA.[FN6] The district court concluded that Great Seneca and Javitch did not make false or deceptive representations and that Hartman's and Rice's OCSPA claims should therefore be dismissed. For the reasons discussed above, Hartman and Rice have sufficiently alleged that Great Seneca's and Javitch's representations were misleading and

deceptive. Accordingly, their OCSPA claims should not have been dismissed. *See Kistner*, 518 F.3d at 441 ("The district court also granted summary judgment to Margelefsky on Kistner's OCSPA claims. Judgment on these claims was predicated on the court's conclusion that the collection letter 'did not make any misrepresentations, nor was it deceptive in any way,' and therefore did not violate the FDCPA. Kistner presented no independent evidence for her OCSPA claims, and the district court therefore saw no reason not to grant summary judgment to Margelefsky on those claims. Because we have concluded that summary judgment on the FDCPA claims was improperly granted, Kistner's OCSPA claims... must be remanded to the district court for reconsideration."). Similarly, because Hartman's and Rice's § 1692f claims were dismissed based on the district court's conclusion that Great Seneca's and Javitch's representations were not deceptive or misleading, summary judgment on those claims is improper.

> FN6. Great Seneca and Javitch argue that Hartman and Rice waived their OCSPA claims by failing to brief them on appeal. This assertion is incorrect; Hartman and Rice adopted their FDCPA analysis in connection with their OCSPA claims.

C. Defense of Bona Fide Error

The FDCPA provides a bona-fide-error defense which states that:

A debt collector may not be held liable in any action

> brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. § 1692k(c). This court recently held that this defense applies to mistakes of law as well as to clerical errors. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 538 F.3d 469, 476 (6th Cir.2008). "To qualify for the bona fide error defense, a debt collector must prove by a preponderance of the evidence that: (1) the violation was unintentional; (2) the violation was a result of a bona fide error; and (3) the debt collector maintained procedures reasonably adapted to avoid any such error." *Id.* at 476-77.

In each case, the district court found that even if summary judgment was not proper because of a genuine issue whether the least sophisticated consumer would be confused or misled, Great Seneca and Javitch had established that they were entitled to the BFE defense. The district court based this finding on its conclusion that Great Seneca had no intent to mislead or misrepresent, that Great Seneca has exhaustive procedures in place to verify financial information associated with debts, that Great Seneca hired a law firm to manage its portfolio, and that Javitch relied on Great Seneca's representations and did not believe that calling Exhibit A an "account" was prohibited by the FDCPA. Contrary to the district court's conclusion, Great Seneca and Javitch have not established that they qualify for the BFE defense.

Taking the facts in the light most favorable to Hartman and Rice, we believe that Great Seneca and Javitch have not shown that the violation was unintentional. Indeed, Hartman and Rice assert that Great Seneca and Javitch made Exhibit A look like a credit-card statement in order to avoid Ohio law. Nor have Great Seneca and Javitch shown by a preponderance of the evidence that they maintained procedures intended to avoid the type of error that occurred. The error made by Great Seneca and Javitch was a mistake of law; they represented that Exhibit A was an account in a manner that could be found to be misleading or deceptive. However, Great Seneca's and Javitch's arguments fail to address the procedures that they had in place to avoid this type of error. Before the district court, Great Seneca and Javitch extensively detailed the process of the electronic transfer of debts to show that the amount they alleged was actually the amount owed. Procedures meant to ensure that the amount of a debt is properly verified are not at issue in these cases, as Hartman and Rice do not now dispute the underlying debts. One of Javitch's managing partners stated that he believed that Ohio law permitted the use of a document like Exhibit A in a creditor's claim. This statement suggests that the violation was unintentional, but it does not detail any procedures that Great Seneca or Javitch used to ensure that mistakes of law did not occur. Great Seneca and Javitch presented no evidence that they perform ongoing FDCPA training, procure the most recent case law, or have an individual responsible for continuing compliance with the FDCPA. *See Jerman*, 538 F.3d at 477.

Taking the facts in the light most favorable to Hartman and Rice, we believe that Great Seneca and Javitch have not shown by a preponderance that the violation was unintentional or that they employ procedures meant to avoid mistakes of law that could cause FDCPA violations. Therefore, the district court erred in its conclusion that Great Seneca and Javitch are entitled to dismissal at the summary-judgment stage of this litigation on the ground that they have established the BFE defense. Whether Great Seneca and Javitch can establish the elements of the BFE defense by a preponderance of the evidence is an issue that may be explored further as the litigation proceeds on remand.

D. Constitutionality of the FDCPA

In the district court, Great Seneca and Javitch argued that the complaints that they filed in state court were protected by the First Amendment and that the FDCPA is unconstitutionally vague and overbroad when applied to pleadings that are not baseless.[FN7] The United States intervened to address these arguments.

> FN7. The United States argues that these arguments should be deemed waived as they were only briefly noted in Great Seneca and Javitch's appellate briefs. However, because Great Seneca and Javitch did detail these arguments before the district court, and asserted these arguments as an alternate basis for upholding the judgment, we do not conclude that these arguments have been waived.

Great Seneca and Javitch argue that they are immune from suit based on statements made during judicial proceedings and that permitting such suits as brought here under the FDCPA would violate their constitutional right to petition granted in the First Amendment. Similarly, Great Seneca and Javitch urge us to use the *Noerr-Pennington* doctrine to limit the application of the FDCPA. The Ninth Circuit has explained that "[u]nder the *Noerr-Pennington* rule of statutory construction, we must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir.2006). However, there are various indications that the First Amendment and any common-law privilege that applied to statements made during judicial proceedings do not foreclose the current actions.

First, the Supreme Court's conclusion in *Heintz v. Jenkins,* 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995), indicates that the FDCPA is intended to burden debt-collectors even when they are engaged in litigation. An unpublished opinion of this court recently considered the constitutionality of the FDCPA and concluded:

> With respect to litigation immunity, Javitch maintains that "[t]he Right to Petition under the First Amendment has been construed by Courts to afford *qualified* immunity [to lawyers engaged in litigation]" (JA 38) (emphasis added), and, at the same time, "[l]awyers possess an *absolute* privilege [under common law] concerning

> statements they make which are reasonably related to and made in the course of judicial proceedings, and are likewise *absolutely* immune from suit for claims which are based on such statements." (JA 54) (emphases added.) Accepting these propositions as true as applied to Javitch would, of course, undercut *Heintz v. Jenkins*- where the Supreme Court held that "the Act applies to attorneys who 'regularly' engage in consumer-debt-collection activity, *even when that activity consists of litigation.*" 514 U.S. at 299, 115 S.Ct. 1489 (emphasis added); *see also* 15 U.S.C. § 1692a(6). Javitch does not dispute that it " 'regularly' engage[s] in consumer-debt-collection activity." *See Heintz,* 514 U.S. at 299, 115 S.Ct. 1489. So any discussion of litigation immunity as applied to lawyers in general (those who do not regularly engage in consumer-debt-collection activity) is of no help to Javitch. The Supreme Court has already said that lawyers, in their function as debt collectors, are covered by the Act.

Gionis v. Javitch, Block & Rathbone, LLP, 238 Fed.Appx. 24, 26 (6th Cir.2007) (unpublished). Given the Supreme Court's detailed analysis and clear conclusion in *Heintz* that the FDCPA does apply to litigation-related activity, we believe that *Gionis* correctly concluded that the First Amendment does not shield lawyers engaged in litigation from FDCPA liability. *See Heintz,* 514 U.S. at 294, 115 S.Ct. 1489. The opposite conclusion, that the First Amendment prohibits FDCPA suits based on statements made during judicial proceedings, would negate the Supreme Court's holding that the FDCPA "does apply to lawyers *engaged in litigation.*" *Heintz,* 514 U.S. at

294, 115 S.Ct. 1489 (emphasis added). Most of the other circuits that have considered this question have reached the same conclusion. *Sayyed v. Wolpoff & Abramson,* 485 F.3d 226, 232 (4th Cir.2007) ("All circuits to consider the issue, except for the Eleventh, have recognized the general principle that the FDCPA applies to the litigation activities of attorneys who qualify as debt collectors under the statutory definition.").

Heintz did not consider, however, whether the application of the FDCPA to statements made during judicial proceedings would violate the Constitution. Even assuming that the First Amendment provides some protection from FDCPA suits based on conduct and statements during litigation, we believe that the First Amendment would not protect the conduct at issue in this case. The Supreme Court has explained that the Petition Clause of the First Amendment does not provide an absolute right to petition. *McDonald v. Smith,* 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985). Instead, the Petition Clause protects legitimate petitioning but not sham petitions, baseless litigation, or petitions containing "intentional and reckless falsehoods." *Id.* at 484, 105 S.Ct. 2787. In the context of defamation suits, the Supreme Court has explained that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). Hartman and Rice assert that

Great Seneca and Javitch intentionally misrepresented that Exhibit A was an "account," and under the cases cited, it is clear that even assuming that there is some First Amendment protection relevant to the FDCPA, such an allegedly false statement is not immunized by the Petition Clause.

Great Seneca and Javitch next argue that the FDCPA is unconstitutionally vague and overbroad because if they can be punished for their behavior here, "it would lead to strict liability for what is protected petitioning activity...." Mem. in Supp. of Claim of Unconstitutional Fed. Stat. at 3. "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). There is no assertion here that the statute leads to arbitrary enforcement, and this statute provides adequate notice. Great Seneca and Javitch overstate their case when they complain of strict liability for non-frivolous state-court petitions. A debt collector who made literally true representations in a petition that violated the FDCPA because the representations were misleading would be protected from liability by the BFE defense if the collector could show that the mistake was unintentional, made in good faith, and that the collector had procedures to avoid such a mistake. *See Jerman*, 538 F.3d at 476-77. The FDCPA does, however, punish a debt collector who makes a

misleading or deceptive representation intentionally, in bad faith, or in the absence of procedures intended to avoid that type of error. That Great Seneca and Javitch may fall into the second category does not indicate that the FDCPA is an unconstitutional restriction on the right to petition.

The overbreadth doctrine is "manifestly, strong medicine" that "should be employed 'only as a last resort.' " *Sensations, Inc. v. City of Grand Rapids,* 526 F.3d 291, 300 (6th Cir.2008) (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). An overbreadth challenge requires the party challenging the statute to show that there is " 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.' " *Id.* (quoting *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). Great Seneca and Javitch have not made the significant showing required, and we decline their request to affirm the district court's judgment on these alternate grounds.

Great Seneca and Javitch also argue that this application of the FDCPA violates their rights to substantive due process. However, "the Supreme Court has repeatedly cautioned that the concept of substantive due process has no place when a provision of the Constitution directly addresses the type of illegal governmental conduct alleged...." *Montgomery v. Carter County,* 226 F.3d 758, 769 (6th Cir.2000). Here it seems that any substantive-due-process argument Great Seneca and Javitch

have is encompassed by their First Amendment claims. Accordingly, we will not independently consider their assertion of a violation of substantive due process.

Great Seneca and Javitch finally assert that this application of the FDCPA violates the Commerce Clause because it would involve the interference of the federal government with state rules of civil procedure. This argument is misdirected. Holding Great Seneca and Javitch liable under the FDCPA has no effect on Ohio state law. Instead, it punishes Great Seneca and Javitch for acting in a misleading and deceptive manner while using the Ohio court system. Ohio law is implicated in making this determination, but Ohio law is not altered by the federal prohibition on false, deceptive, or misleading debt collection. Accordingly, we refuse to affirm the district court's grant of dismissal on this alternate ground.

E. Great Seneca's Claim of Voluntary Dissolution

After oral argument, the attorney for Great Seneca and Javitch filed a motion to dismiss Great Seneca from the cases. On March 6, 2009, prior to oral argument, Great Seneca notified this court that Great Seneca had filed for voluntary dissolution in Maryland, but that this action did not "moot or abate" the appeals. Great Seneca Notice, March 6, 2009, at 1. In the post-argument motion to dismiss, Great Seneca asserts that because it filed its formal articles of dissolution on March 25, 2009, these articles were accepted by Maryland, and it has no assets to distribute, Great Seneca has ceased to

exist and can no longer be sued. However, because fact questions remain as to whether Great Seneca has been dissolved under Maryland law and whether it still has assets to distribute, we **REMAND** to the district court the question of whether Great Seneca should remain a party to this litigation.

III. CONCLUSION

Because we conclude that there is a genuine issue of material fact as to whether calling Exhibit A an "account" would have misled the least sophisticated consumer, and because we cannot conclude on these facts that the bona-fide-error defense must apply, we **REVERSE** the district court's grant of summary judgment to Great Seneca and Javitch and **REMAND** the cases for proceedings consistent with this opinion. We also **REMAND** the question of whether Great Seneca should remain a party to this litigation, given its alleged voluntary dissolution.

OLIVER, District Judge, concurring.

I concur in Judge Moore's opinion, but I write separately to discuss the way in which I find Great Seneca's document to be potentially misleading to the least sophisticated consumer.

While this case presents a close call, I find that there is slightly more than a scintilla of evidence to support the argument that the least sophisticated consumer would be misled into thinking that this document was a credit card statement from Great Seneca Financial Corporation. As stated in the majority opinion, the document facially resembles

that of a credit card statement, as it is arranged in a tabular format with boxes for credit limit, credit available, and new transactions similar to a legitimate credit card statement.

Additionally, it includes boxes for the statement closing date and the date of the transaction. In these boxes, Great Seneca has included dates that are years after the individual consumers acquired their debt with Providian. The least sophisticated consumer, in reviewing this document, could be misled into believing that it was a credit card statement for an account with Great Seneca that involved transactions that occurred on the date listed. That consumer might then conclude that he or she never opened a credit card with Great Seneca and did not engage in any transactions with Great Seneca on such a date. This interpretation of the document would lead the least sophisticated consumer to disregard the statement as one merely issued in error. Accordingly, I concur that Plaintiffs have provided sufficient evidence to give rise to a genuine issue of material fact regarding whether this statement would mislead the least sophisticated consumer.

WHITE, Circuit Judge, dissenting.

I respectfully dissent. Plaintiffs' claims rest on the assertion that the accounts attached to the complaints as Exhibit A are false, deceptive or misleading. The majority concludes that there is a genuine issue of material fact whether defendants' representations embodied in the accounts are deceptive or misleading. Because I agree with the district court that Exhibit A to the complaints would not mislead the least sophisticated

consumer, *Harvey v. Great Seneca Financial Corp.*, 453 F.3d 324 (6th Cir.2006), I would affirm.

The accounts attached to the complaints clearly stated that Great Seneca, the creditor, is the assignee of Unifund, assignee of Providian. Thus, the least sophisticated consumer would know that the complaint concerns a debt once owed to Providian. And, while the exhibits do, indeed, appear to be credit card statements, the original debts were incurred by use of a credit card. Further, the account statements provide account numbers that match the original credit card accounts, thus giving additional notice of the source of the original obligation to Providian. On the other hand, the account statements do not purport to show purchases or charges; they are clearly summaries of the balances due on the debts once owed to Providian. Whether the account statements satisfy the requirements of Ohio law is a separate question, the answer to which does not affect whether the account statements are false, misleading or deceptive. I cannot agree that the use of these statements of account would mislead the least sophisticated consumer into believing that he or she incurred a recent debt by use of a credit card issued by Great Seneca. [FN1]

> FN1. I note that plaintiffs' complaints focus on the use of these statements of account to "falsely impl[y] that Defendants had possession of documentation from the original creditor which showed a precise amount due as of a 'statement closing date.' " A similar claim was rejected in *Harvey*, 453 F.3d at 331-33.

Nor can I conclude that use of such account statements by an assignee as an attachment to a court complaint constitutes an "unfair or unconscionable means to collect or attempt to collect any debt." Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692f. While one can conceive of circumstances where a court filing would amount to an unfair or unconscionable means of debt collection, the use of this form of statement to collect an otherwise valid and actionable debt is not unfair or unconscionable.

I would affirm.

United States District Court,
S.D. Ohio,
Eastern Division.
Deborah L. RICE, Plaintiff,
v.
GREAT SENECA FINANCIAL CORP., et al.,
Defendants.
No. 2:04-cv-00951.

May 21, 2008.

Steven Charles Shane, Bellevue, KY, Stephen R. Felson, Cincinnati, OH, for Plaintiff.

Michael J. Chapman, Javitch Block & Rathbone LLP, Cincinnati, OH, Robert Glenn Knirsch, Michael D. Slodov, Javitch, Block & Rathbone, Cleveland, OH, for Defendants.

OPINION AND ORDER

GEORGE C. SMITH, District Judge.

Plaintiff Deborah L. Rice ("Plaintiff") has filed this lawsuit against Defendants Great Seneca Financial Corporation ("Great Seneca") and Javitch, Block & Rathbone, LLP ("JB & R"), (collectively "Defendants"), alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, and the Ohio Consumer Sales Practices Act ("OCSPA"), O.R.C. § 1345.01 *et seq.* This matter is before the Court pursuant to Defendant Great Seneca's Motion for Summary Judgment (Doc. 57). Also before the Court is Defendant JB & R's Motion for Summary Judgment (Doc. 61) and Plaintiff's Motion for Partial Summary Judgment (Doc. 68). Defendants

have also filed a Notice of Claim of Unconstitutional Federal Statute (Doc. 33). The United States of America, as intervenor, filed a response to the notice (Doc. 50) as well as a memorandum in opposition to Defendants' motions for summary judgment, limited to the unconstitutionality questions raised by Defendants (Doc. 71). For the reasons that follow, the Court **GRANTS** Defendant Great Seneca's Motion for Summary Judgment (Doc. 57), **GRANTS** Defendant JB & R's Motion for Summary Judgment (Doc. 61), and **DENIES** Plaintiff's Motion for Partial Summary Judgment (Doc. 68).

I. FACTUAL BACKGROUND

Plaintiff Rice is a consumer who opened a credit card account with Providian National Bank on or about June 26, 2000, account number xxxxxxxxxxxx3025. Plaintiff received the terms and conditions of the credit card, which permitted transfer or assignment of right to payment. Plaintiff used the account from July 25, 2000 through March 21, 2001, at which time the account had an outstanding balance of $1,994.88. The account records indicate that final payment before charge off was made on April 6, 2001. The last fees were posted to the account in November 2001, with final balance being $2,778.99. The final statement before Plaintiff's account was sold, dated January 28, 2003, reflected the $2,778.99 balance.

In February 2003, Providian National Bank sold Plaintiff's account to Unifund CCR Partners. Later that same month, Unifund sold the account to Defendant Great Seneca. With each sale, certain

electronic information was transmitted, including the account number, name of the debtor, address, city, state, zip, phone, current balance, charge off date, charge off amount, last payment amount, last payment date, social security number, APR, account opening date, and an issuer flag for each account. Throughout this time, Plaintiff's account did not accrue additional fees and had an interest rate of 0%. In August 2003, Defendant JB & R, on behalf of Defendant Great Seneca, sent a validation notice to Plaintiff. Plaintiff did not timely respond to the validation notice.

In October 2003, Defendant JB & R, on behalf of Defendant Great Seneca, filed a civil complaint against Plaintiff in Jefferson County Court No. 2, Jefferson County, Ohio, which sought to recover the outstanding $2,778.99. The state court complaint stated:

> 1. There is due the Plaintiff from the Defendant upon an account, the sum of $2,778.99.
>
> 2. A copy of the said Account is attached hereto as "Exhibit A."
>
> 3. Although due demand has been made, Defendant has failed to liquidate the balance due and owing.
>
> Wherefore, the Plaintiff prays for a Judgment against the Defendant in the amount of $2,778.99 with interest at the rate of 10% per annum from date of judgment, and costs of the within action.

(Am.Compl., Ex. A). Attached as Exhibit A to the

state court complaint was an account statement from Great Seneca, which included the account number (xxxxxxxxxxxx3025), a closing date of August 8, 2003, a past due amount of $2,778.99, and a balance due on the account of $2,778.99. The account statement resembled an account statement a credit card company might send to a consumer in that it had boxes for "credit limit," "credit available," "previous balance," and "payments and credits." Each of those boxes remained empty or had a "0" in them. In addition, the statement disclosed both the original creditor and the prior owners of the account, Providian and Unifund. Ultimately, Defendants dismissed the state court action without prejudice.

On October 1, 2004, Plaintiff Rice filed her original complaint (Doc. 1). The Amended Complaint was filed on April 27, 2007 (Doc. 37). Plaintiff alleges that paragraph two of the state court complaint and the Exhibit A account statement violate the FDCPA and OCSPA (*See* generally Amended Complaint). Plaintiff has filed a Motion for Partial Summary Judgment, arguing that Defendants are liable for violations of the FDCPA and OCSPA (Doc. 68). Defendants have filed a Notice of Claim of Unconstitutional Federal Statute (Doc. 33), arguing that: (1) the First Amendment precludes the imposition of strict liability under the FDCPA for content of a civil suit; and (2) applying FDCPA to certain pleadings and affidavits filed in state court renders the FDCPA unconstitutionally vague and overbroad, violates substantive due process, and exceeds Congress' authority under the Commerce Clause of Article I of the United States Constitution. (*See* generally, Defendants' Notice of

Claim of Unconstitutional Federal Statute). The United States of America, as intervenor, filed a response to the Notice (Doc. 50), as well as a memorandum in opposition to Defendants' motions for summary judgment, limited to the unconstitutionality questions raised by Defendants (Doc. 71). Defendants JB & R and Great Seneca have also filed motions for summary judgment, arguing that they are entitled to summary judgment with respect to each of Plaintiff's claims (Docs. 57 and 61). These motions have been fully briefed and are now ripe for review.

II. RULE 56 STANDARD

The standard governing summary judgment is set forth in Fed.R.Civ.P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment will not be granted if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could not return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden

of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see also Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, and must refrain from making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150-51, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). The Court disregards all evidence favorable to the moving party that the jury would not be required to believe. *Id.* Stated otherwise, the Court must credit evidence favoring the nonmoving party as well as evidence favorable to the moving party that is uncontroverted or unimpeached, if it comes from disinterested witnesses. *Id.*

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby, Celotex,* and *Matsushita* effected "a decided change in summary judgment practice," and ushered in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1476 (6th Cir.1989). The Court in *Street* identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily appropriate for summary judgment. *Id.* at 1479.

Additionally, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the

movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.' " *Id. (quoting Liberty Lobby,* 477 U.S. at 257, 106 S.Ct. 2505). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party merely to " 'show that there is some metaphysical doubt as to the material facts.' " *Id. (quoting Matsushita,* 475 U.S. at 586, 106 S.Ct. 1348).

Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* at 1479-80. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *In re Morris,* 260 F.3d 654, 665 (6th Cir.2001).

III. DISCUSSION

Plaintiff alleges that Defendants are debt collectors who have violated the FDCPA and OCSPA by engaging in an unfair debt collection practice and a deceptive consumer practice. (*See* generally, Am. Compl.). More specifically, Plaintiff alleges Defendants violated the FDCPA in two ways: (1) Defendant JB & R violated 15 U.S.C. §§ 1692e and e(10) when it represented in paragraph two of the state-court complaint that it had attached a copy of Plaintiff's account because that statement was literally false; and (2) Defendant Great Seneca violated 15 U.S.C. §§ 1692e, e(10), and f by generating the account statement that was

attached as Exhibit A to the state-court complaint such that it resembled a monthly statement from a credit card issuer. (Pl.'s Mot. for Summ. J. at 1). Plaintiff argues that this same conduct violated OCSPA, O.R.C. §§ 1345.02 and .03. (*Id.*). Defendants deny these allegations and argue that they are entitled to summary judgment on all claims.

In 1977, Congress enacted the Fair Debt Collection Practices Act "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). "The Sixth Circuit has noted that the FDCPA is 'extraordinarily broad' and must be enforced as written, even when eminently sensible exceptions are proposed in the face of innocent and/or de minimis violations." *Hartman v. Asset Acceptance Corp.*, 467 F.Supp.2d 769, 774 (S.D.Oh.2004) (Beckwith, J.) (*citing Frey v. Gangwish*, 970 F.2d 1516, 1521 (6th Cir.1992)).

Plaintiff has alleged violations of the FDCPA, 15 U.S.C. §§ 1692e, 1692e(10), and 1692f. The relevant portions of those statutes are as follows:

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * * * * *

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.

15 U.S.C.A. §§ 1692e, 1692f.

When a Court is evaluating a debt collection practice, that practice "must be viewed objectively from the standpoint of the 'least sophisticated consumer.' " *Gionis v. Javitch, Block & Rathbone,* 405 F.Supp.2d 856, 864 (S.D.Ohio 2005) (Holschuh, J.) (*quoting Taylor v. Perrin, Landry, deLaunay & Durand,* 103 F.3d 1232, 1236 (5th Cir.1997)). *See also, Lewis v. ACB Bus. Servs., Inc.,* 135 F.3d 389, 400 (6th Cir.1998); *Smith v. Transworld Systems, Inc.* 953 F.2d 1025, 1029 (6th Cir.1992). "This standard 'protects all consumers, the gullible as well as the shrewd.' " *Id. (quoting Clomon v. Jackson,* 988 F.2d 1314, 1318 (2d Cir.1993)). "Although this standard protects naive consumers, it also 'prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care.' " *Federal Home Loan Mortgage Corp. v. Lamar,* 503 F.3d 504, 509-10 (6th Cir.2007)

(*quoting Wilson v. Quadramed Corp.*, 225 F.3d 350, 354-55 (3rd Cir.2000) (internal citations omitted)). The *Lamar* Court explained, "this standard 'assumes that a validation notice [or, as in this case, a state court complaint] is read in its entirety, carefully and with some elementary level of understanding.' " *Id.* at 510 (*quoting Martinez v. Law Offices of David J. Stern, P.A.*, 266 B.R. 523, 532 (Bankr.S.D.Fla.2001)).

A. Paragraph Two of the State Court Complaint

Paragraph two of the state court complaint states: "A copy of the said Account is attached hereto as 'Exhibit A.' " Plaintiff, relying on *Hartman v. Asset Acceptance Corp.*, 467 F.Supp.2d 769 (S.D.Ohio 2004) (Beckwith, J.), argues this statement is literally false and therefore violates the FDCPA. (Pl.'s Mot. for Summ. J. at 5).

In *Hartman*, the debt collector had represented that it was a holder in due course of the consumer's obligation. Chief Judge Beckwith found that such a representation was in violation of the FDCPA if: (1) the representation was, in fact false; and (2) the debt collector could not establish entitlement to the bona fide error defense set forth in § 1692k(c). *Hartman*, 467 F.Supp.2d at 779.

In response to Plaintiff's accusations, Defendants argue that the statement contained in paragraph two of the state court complaint is not false. (Defs.' Memo in Opp. to Pl.'s Mot. for Summ. J. at 2-3). Defendants further contend that regardless, any violation was the result of bona fide error, and

consequently, liability cannot attach because the bona fide error defense is available to Defendants. (*Id.* at 7; Great Seneca's Mot. for Summ. J. at 12-19). The Court agrees.

Plaintiff, in seeking to convince this Court that Exhibit A to the state court complaint is not truly an account as paragraph two represents, spends a significant amount of time educating the Court on the procedural requirements for pleading a claim for recovery under an account theory under Ohio Civ. R. 10, and the evidentiary standards necessary to prevail under an account theory of recovery. (*See* Pl.'s Mot. for Summ. J. at 8-11). Plaintiff opines that the only way a purchased debt creditor can satisfy these procedural requirements and evidentiary standards is to attach all of the original creditor's records to an account pleading. (*Id.* at 9). Plaintiff next alleges that Exhibit A to the state court complaint, which is generated by Great Seneca rather than by Providian (the original creditor), fails to meet these procedural requirements and evidentiary standards because it "does not begin with a zero balance, does not include any debits or credits, and therefore cannot provide an accurate balance due." (*Id.* at 11-12). Plaintiff concludes, "For this reason there can be no doubt that Javitch's representation in paragraph two of its collection complaint - a copy of the said Account is attached hereto as 'Exhibit A'-was literally false." (*Id.* at 12).

Conspicuously absent from Plaintiff's analysis is any FDCPA case law supporting her contention that such a procedural challenge to a state court pleading-i.e., the failure to attach all of the original

creditor's documents-violates 15 U.S.C. §§ 1692e, 1692e(10) or 1692f. And, though the Court declines to pass upon the issue of whether or not Exhibit A to the state court complaint meets Ohio's procedural requirements and evidentiary standards, the Court notes that Plaintiff has identified no Ohio case law requiring a purchased debt creditor to attach all of the original creditor's records to an account pleading.[FN1]

> FN1. Instead, Plaintiff's Motion refers to several Municipal Court orders from 2005 and 2006 where Ohio trial courts have granted motions for a more definite statement, as well as a sanction order on appeal in *Capital One Bank v. Day*, 4th App. Dist. No. 07-CA-3164. These orders are irrelevant to the 2004 filing currently before this Court. Further, the orders demonstrate that Ohio trial courts are capable of policing their own dockets.

As Defendants readily point out, the U.S. Supreme Court has stated, "an ordinary open account[,] as generally defined in the commercial world ... is an unsettled claim or demand made by the creditor which appears in his account books." *Smith v. Davis*, 323 U.S. 111, 114, 65 S.Ct. 157, 89 L.Ed. 107 (1944). Under Ohio law, "[I]n an action on an account, the word 'account' has reference to the type of relationship between the parties and not to a particular book or record." *American Sec. Service, Inc. v. Baumann*, 32 Ohio App.2d 237, 245, 289 N.E.2d 373 (1972); *Mt. Sinai Hospital of Cleveland v. McCurdy*, 1979 WL 210165, *5 (1979) (" 'Account' is a word of ordinary and common acceptance in

legal terminology and may be defined as an unsettled claim or demand by one person against another, based upon a transaction creating a debtor and creditor relationship between the parties which is usually but not necessarily represented by an ex parte record kept by one or both of them." (*quoting* 1 Am.Jur.2d 371, Accounts and Accounting, sec. 1)).

In the instant case, there is no factual dispute that at the time the at-issue account statement was created and attached to the pleading by Defendant JB & R, an unsettled claim existed on the books of Defendant Great Seneca owed by the Plaintiff in the precise amount of $2778.99. Further, there is no factual dispute over the format or content of the Exhibit A account statement attached to the state court complaint, which listed $2778.99 as the "balance due" to Defendant Great Seneca as an assignee of Unifund and Providian as a new transaction dated August 8, 2003.

The Court finds that Plaintiff has failed to demonstrate that the statement contained in paragraph two of the state court complaint is false. Instead, Defendants have presented evidence demonstrating that it did, in fact, have a valid claim against Plaintiff and Exhibit A was a record generated by Defendant Great Seneca that accurately reflected the terms of that account. Accordingly, the Court finds that Defendants' statement in paragraph two of the state court complaint did not violate 15 U.S.C. §§ 1692e or 1692e(10).

B. Exhibit A

Plaintiff next argues that even if Defendant JB & R's representations concerning Exhibit A to the state court complaint were literally true, Defendant Great Seneca nonetheless violated 15 U.S.C. §§ 1692e, e(10), and f by generating the Exhibit A account statement in such a manner that it was misleading. (Pl.'s Mot. for Summ. J. at 1, 13-15).

Defendants counter that the format of its billing statements is "intended to enhance consumer understanding, and has never been claimed or shown to be confusing, misleading or deceptive." (Defs.' Memo. in Opp. to Pl.'s Mot. for Summ. J. at 6). Defendants rely on *Federal Home Loan Mortg. Corp. v. Lamar,* 503 F.3d 504, 512-513 (6th Cir.2007), and contend that Plaintiff's failure to propose a reasonable, alternate inaccurate reading of the account is fatal to her claims.

In *Lamar,* the Sixth Circuit followed the Seventh and Second Circuits in holding that claims under § 1692e and § 1692f relating to false, deceptive, misleading or unfair or unconscionable conduct by a debt collector are to be evaluated in the same manner as claims under § 1692g, that is, "a collection notice is deceptive when it can be reasonably read to have two or more different meanings, one of which is inaccurate." 503 F.3d at 512-13 (*quoting Russell v. Equifax A.R.S.,* 74 F.3d 30, 35 (2d Cir.1996) and *McMillan v. Collection Professionals Inc.,* 455 F.3d 754, 759 (7th Cir.2006) ("Whether or not a [communication] is 'false, deceptive, or misleading' (in violation of § 1692e)" is an inquiry similar to "whether a [communication] is confusing in violation of § 1692g.")). Accord, *Kistner*

v. Law Offices of Michael P. Margelefsky, LLC, 518 F.3d 433, 441 (6th Cir.2008).

The Court has already rejected Plaintiff's contention that Defendant JB & R made a false representation concerning the attachment of an "Account" as Exhibit A to the state court complaint. (*See* discussion, *supra,* Section III.A). Plaintiff is now urging the Court to find that even though the statement has been found to be literally true, it is misleading. (Pl.'s Mot. of Summ. J. at 13). Plaintiff appears to advance two slightly different reasons for why she contends the Exhibit A statement is misleading. First, Plaintiff claims that the least sophisticated consumer would be "fooled" into thinking that the Exhibit A statement was "generated by the issuer of the original credit card." (*Id.* at 14). Second, she contends that: "The unsophisticated consumer, probably the sophisticated consumer, and possible even the unsophisticated lawyer or judge-could be duped into thinking that Great Seneca actually had an 'Account' in its files and that this was simply the last page of it." (*Id.* at 15).

Plaintiff correctly asserts that literally true statements can be misleading, and thus in violation of the FDCPA, §§ 1692e and 1692e(10). *See, e.g., Gionis v. Javitch, Block & Rathbone LLP*, 238 Fed.Appx. 24 (6th Cir.2007); *McMillan, supra,* 455 F.3d at 758. And, as set forth above, Plaintiff properly points out that this Court must evaluate Exhibit A objectively from the standpoint of the least sophisticated consumer to determine if the statement is false, deceptive or misleading. The Court cannot, however, agree with Plaintiff's

conclusion that the format of the Exhibit A statement is misleading in violation of the FDCPA.

First, the Court rejects Plaintiff's argument that the least sophisticated consumer would be fooled into believing that the Exhibit A account statement was generated from the original issuer of the credit card. As set forth above, the Sixth Circuit has stated that the standard assumes that the at-issue document "is read in its entirety, carefully and with some elementary level of understanding." *Lamar*, 503 F.3d at 510 (*quoting Martinez*, 266 B.R. at 532). The Exhibit A statement specifically disclosed both the original creditor and the prior owner of the account, Providian and Unifund. The statement identified Great Seneca Financial Corp. as the assignee of the account. In addition, the statement included the account number (xxxxxxxxxxxx3025) assigned by Providian and a balance due on the account of $2,778.99. The least sophisticated consumer, with a careful reading of the Exhibit A statement, would understand that Great Seneca was an assignee of Providian, and that the statement was generated by Great Seneca to collect on the Providian account. Plaintiff has failed to present any evidence to the contrary. She has presented no affidavits, no expert opinion, nothing to demonstrate that there is a genuine issue of fact as to the nature of the Exhibit A statement. She does not and cannot make a claim of falsity as to the amount owed and there is no genuine factual dispute that she was liable for the debt for the precise amount claimed at the time the suit was filed.

Second, the Court rejects Plaintiff's argument that

the least sophisticated consumer would be duped into thinking that this was just the last page of an account contained in Defendant Great Seneca's files. Neither the Exhibit A statement, nor the state court complaint itself, contain any representations regarding what Defendant Great Seneca actually had in its file or the manner in which account records are maintained. Instead, the Exhibit A statement clearly identifies that Defendant Great Seneca was the assignee of the balance due under the debt Plaintiff owed to Providian in the amount of $2,778.99. As set forth above, the Exhibit A statement even contained the account number assigned by Providian. Again, Plaintiff fails to present any evidence demonstrating that the Exhibit A account statement is deceptive, misleading, or an unfair means of attempting to collect a debt under 15 U.S.C. §§ 1692e, 1982e(10) or 1692f. The Court finds that it is not reasonable for a consumer who owes a legitimate debt, upon receipt and reading the pleading and attachment, to be confused, misled or deceived over how much paper substantiating his or her debt is in the file of Defendant Great Seneca. Accordingly, Plaintiff's claims fail as a matter of law.

C. Bona Fide Error Defense

The Court finds that even if Plaintiff had demonstrated that genuine issues of fact existed, Defendants are entitled to the bona fide error defense.

The FDCPA's bona fide error provision shields a debt collector from liability for violating the FDCPA in certain instances. *See* 15 U.S.C. §

1692k(c). The bona fide error provision provides:

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C.A. § 1692k. The bona fide error defense applies to mistakes of law as well as to clerical errors. *Taylor v. Luper, Sheriff & Niedenthal Co., L.P.A.*, 74 F.Supp.2d 761, 765-767 (S.D.Ohio 1999) (Graham, J.). Three factors should be considered when performing an analysis of whether the bona fide error defense applies: (1) whether the alleged violation was unintentional; (2) whether the alleged violation resulted from a bona fide error; and (3) whether the debt collector maintained procedures reasonably adapted to avoid errors. *See Beck v. Maximus, Inc.*, 457 F.3d 291, 297-98 (3d Cir.2006); *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 537 (7th Cir.2005).

Defendant Great Seneca has established the elements of the bona fide error defense to the FDCPA. Defendant Great Seneca's representatives have testified that the state court complaint's Exhibit A account statement was intended to serve as evidence of Great Seneca's ownership of the debt, and it was not intended to mislead, deceive or misrepresent the character or nature of the debt. (Great Seneca's Mot. for Summ. J. at 13). The representatives further testified that no person has ever claimed that they were misled, deceived, or

that they misunderstood the Great Seneca account statement. (*Id.).* Defendant Great Seneca has also set forth in great detail the process for obtaining the debts and electronic systems utilized to acquire, store and transmit the financial information for each account. (*Id.* at 13-18). Finally, Defendant Great Seneca points out that they followed existing case law, that they engaged a law firm specializing in debt collection to manage its portfolio, and that the law firm was responsible for compliance with the FDCPA. (*Id.* at 18-19).

Defendant JB & R has also established the elements of the bona fide error defense to the FDCPA. Defendant JB & R correctly asserts that it reasonably relied on its client's representations about Plaintiff's account. *See, e.g., Jenkins v. Heintz,* 124 F.3d 824, 832 (7th Cir.1997), *cert. denied,* 523 U.S. 1022, 118 S.Ct. 1304, 140 L.Ed.2d 469 (1998) (a debt collector may rely on representations made by its client and has no duty to independently investigate the claims presented for collection); *Smith v. Transworld Systems, Inc.,* 953 F.2d 1025, 1032 (6th Cir.1992) (same). Defendant JB & R's co-managing partner, Joel Rathbone, has represented that it was his understanding in 2003 that a purchased debt creditor's claim on a credit card debt could be pled as an account claim, whether or not the purchased debt creditor had possession of all the account documentation, and that a business record created by the purchased debt creditor reflecting the amount owed on the credit card debt was a permissible practice under Ohio law, and was not prohibited by the FDCPA. (Rathbone Decl. ¶¶ 18-21).

Plaintiff has failed to rebut Defendants' arguments. Instead, Plaintiff incorrectly states that Defendants' bona fide error defense is not ripe because it responds to violations not asserted by Plaintiff. (Pl.'s Reply at 5-6; Pl.'s Memo. in Opp. to Def. JB & R's Mot. for Summ. J. at 3-4; Pl.'s Memo. in Opp. to Def. Great Seneca's Mot. for Summ. J. at 2-3).

The Court finds that Defendants are entitled to the bona fide error defense because they have satisfied their burden of proof under 15 U.S.C. § 1692k(c), and Plaintiff has failed to raise any genuine issue of material fact regarding any of the elements of the defense.

Judge Barrett recently quoted a passage from the Sixth Circuit in *Fed. Home Loan Mortg. Corp. v. Lamar,* 503 F.3d 504, 514 (6th Cir.2007) (*quoting Jacobson v. Healthcare Fin. Servs.,* 434 F.Supp.2d 133, 138 (D.N.Y.2006)). *Miller v. Javitch, Block & Rathbone,* 534 F.Supp.2d 772, 778-779, 2008 WL 400256, *5 (S.D.Ohio 2008) (Barett, J.). Though the FDCPA claims of the *Miller* plaintiff were premised upon a different set of factual allegations, the quoted passage is no less applicable to the instant case:

> As a district court in the Second Circuit recently noted "[t]he interaction of the least sophisticated consumer standard with the presumption that the FDCPA imposes strict liability has led to a proliferation of litigation." *Jacobson,* 434 F.Supp.2d at 138. The court in *Jacobson* continued:

Ironically, it appears that it is often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by this statute, not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the "widespread and serious national problem" of abuse that the Senate observed in adopting the legislation, 1977 U.S.C.C.A.N. 1695, 1696, nor to ferret out collection abuse in the form of "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process." *Id.* Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs....

It is interesting to contemplate the genesis of these suits. The hypothetical Mr. Least Sophisticated Consumer ("LSC") makes a $ 400 purchase. His debt remains unpaid and undisputed. He eventually receives a collection letter requesting payment of the debt which he rightfully owes. Mr. LSC, upon receiving a debt collection letter that contains some minute variation from the statute's requirements, immediately exclaims "This clearly runs afoul of the FDCPA!" and-rather than simply pay what he owes-repairs to his lawyer's office to vindicate a perceived "wrong." "[T]here comes a point where this Court should not be ignorant as judges of

what we know as men." *Watts v. State of Ind.*, 338 U.S. 49, 52, 69 S.Ct. 1347, 1349, 93 L.Ed. 1801 (1949).

Id. at 138-39 (emphasis added). We echo Jacobson's sentiments and concerns. Lamar fits the description of Jacobson's hypothetical consumer to a tee, and we will not "countenance lawsuits based on frivolous misinterpretations or nonsensical assertions of being led astray." *Id.* at 138.

Lamar, 503 F.3d at 514 (quoting *Jacobson* 434 F.Supp.2d at 138).

D. Unconstitutionality of the FDCPA

Based upon the foregoing holdings, the Court finds it unnecessary to address Defendants' arguments with respect to the unconstitutionality of the FDCPA. As directed by the U.S. Supreme Court:

> This Court has said repeatedly that it ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable. This is true even though the question is properly presented by the record. If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided. This same rule should guide the lower courts as well as this one.

Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 136-37, 67 S.Ct. 231, 91 L.Ed. 128 (1946)

(internal citations and footnote omitted). *See also, Rice v. Walls,* 213 F.2d 693, 698 (6th Cir.1954) ("The principle of avoiding constitutional questions is one which was conceived out of considerations of sound judicial administration. It is a traditional policy of our courts.") (citations and quotations omitted); *Mihalek Corp. v. Michigan,* 814 F.2d 290, 296 (6th Cir.1987).

E. OCSPA Claims

Plaintiff alleges that Defendants' conduct has violated the OCSPA. (Pl.'s Mot. for Summ. J. at 16). Plaintiff states, "The remaining OCSPA question for purposes of this motion is whether a debt collector's false representation concerning the nature of an attachment to a collection complaint, and/or the simulated monthly statement, are 'unfair or deceptive act(s) or practice(s)' prohibited by Ohio Rev.Code § 1345.02(A)." (*Id.*).

Because this Court has found that: (1) Defendant JB & R's representation in paragraph two of the state court complaint was *not* false; and (2) Defendant Great Seneca's Exhibit A account statement was *not* deceptive, there is nothing to sustain Plaintiff's OCSPA claim.

IV. DISPOSITION

For all of the foregoing reasons, the Court **GRANTS** Defendant Great Seneca's Motion for Summary Judgment (Doc. 57), **GRANTS** Defendant JB & R's Motion for Summary Judgment (Doc. 61), and **DENIES** Plaintiff's Motion for Partial Summary Judgment (Doc. 68).

The Clerk shall remove Documents 57, 61 and 68 from the Court's pending motions list.

The Clerk shall remove this case from the Court's pending cases list.

IT IS SO ORDERED.

United States District Court,
S.D. Ohio,
Eastern Division.
Delores J. HARTMAN, Plaintiff,
v.
GREAT SENECA FINANCIAL CORP., et al.,
Defendants.
No. 2:04-cv-00972.

May 21, 2008.

Steven Charles Shane, Bellevue, KY, Stephen R. Felson, Cincinnati, OH, for Plaintiff.

Michael J. Chapman, Javitch Block & Rathbone LLP, Cincinnati, OH, Michael D. Slodov, Javitch Block & Rathbone LLP, Cleveland, OH, for Defendants.

OPINION AND ORDER

GEORGE C. SMITH, District Judge.

Plaintiff Delores J. Hartman ("Plaintiff") has filed this lawsuit against Defendants Great Seneca Financial Corporation ("Great Seneca") and Javitch, Block & Rathbone, LLP ("JB & R"), (collectively "Defendants"), alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, and the Ohio Consumer Sales Practices Act ("OCSPA"), O.R.C. § 1345 .01 *et seq.* This matter is before the Court pursuant to Defendant Great Seneca's Motion for Summary Judgment (Doc. 72). Also before the Court is Defendant JB & R's Motion for Summary Judgment (Doc. 73) and Plaintiff's Motion for

Partial Summary Judgment (Doc. 77). Defendants have also filed a Notice of Claim of Unconstitutional Federal Statute (Doc. 52). The United States of America, as intervenor, filed a response to the notice (Doc. 64) as well as a memorandum in opposition to Defendants' motions for summary judgment, limited to the unconstitutionality questions raised by Defendants (Doc. 85). For the reasons that follow, the Court **GRANTS** Defendant Great Seneca's Motion for Summary Judgment (Doc. 72), **GRANTS** Defendant JB & R's Motion for Summary Judgment (Doc. 73), and **DENIES** Plaintiff's Motion for Partial Summary Judgment (Doc. 77).

I. FACTUAL BACKGROUND

Plaintiff Hartman is a consumer who opened a credit card account with Providian National Bank on or about May 10, 2000, account number xxxxxxxxxxxx6579. Plaintiff received the terms and conditions of the credit card, which permitted transfer or assignment of right to payment. Plaintiff used the account from May 17, 2000 through March 20, 2001, at which time the account had an outstanding balance of $2,089.33. The account records indicate that final payment before charge off was made on February 9, 2001. The last fees were posted to the account in September 2001, with final balance being $2,565.81. The final statement before Plaintiff's account was sold, dated July 29, 2002 showed an unpaid balance of $2,551.30, after the posting of a $14.51 credit for a class action settlement benefit to her account.

In February 2003, Providian National Bank sold

Plaintiff's account to Unifund CCR Partners. Later that same month, Unifund sold the account to Defendant Great Seneca. With each sale, certain electronic information was transmitted, including the account number, name of the debtor, address, city, state, zip, phone, current balance, charge off date, charge off amount, last payment amount, last payment date, social security number, APR, account opening date, and an issuer flag for each account. Throughout this time, Plaintiff's account did not accrue additional fees and had an interest rate of 0%. In August 2003, Defendant JB & R, on behalf of Defendant Great Seneca, sent a validation notice to Plaintiff. Plaintiff did not timely respond to the validation notice.

In October 2003, Defendant JB & R, on behalf of Defendant Great Seneca, filed a civil complaint against Plaintiff in the County Court for Harrison County, Ohio, which sought to recover the outstanding 2,551.30. The state court complaint stated:

> 1. There is due the Plaintiff from the Defendant upon an account, the sum of $2,551.30.
>
> 2. A copy of the said Account is attached hereto and marked as "Exhibit A."
>
> 3. Although due demand has been made, Defendant has failed to liquidate the balance due and owing.
>
> WHEREFORE, the Plaintiff prays for a Judgment against the Defendant in the amount of $2,551.30 with interest at the rate of 10% per annum from

date of judgment, and costs of the within action.

(Am.Compl., Ex. A). Attached as Exhibit A to the state court complaint was an account statement from Great Seneca, which included the account number (xxxxxxxxxxxx6579), a closing date of August 18, 2003, a past due amount of $2,551.30, and a balance due on the account of $2,551.30 The account statement resembled an account statement a credit card company might send to a consumer in that it had boxes for "credit limit," "credit available," "previous balance," and "payments and credits." Each of those boxes remained empty or had a "0" in them. In addition, the statement disclosed both the original creditor and the prior owners of the account, Providian and Unifund. Ultimately, Defendants dismissed the state court action without prejudice.

On October 7, 2004, Plaintiff Hartman filed her original Complaint (Doc. 1). The Amended Complaint was filed on March 29, 2007 (Doc. 49). Plaintiff alleges that paragraph two of the state court complaint and the Exhibit A account statement violate the FDCPA and OCSPA. (*See* generally Amended Complaint). Plaintiff has filed a Motion for Partial Summary Judgment, arguing that Defendants are liable for violations of the FDCPA and OCSPA (Doc. 68). Defendants have filed a Notice of Claim of Unconstitutional Federal Statute (Doc. 52), arguing that: (1) the First Amendment precludes the imposition of strict liability under the FDCPA for content of a civil suit; and (2) applying FDCPA to certain pleadings and affidavits filed in state court renders the FDCPA unconstitutionally vague and overbroad,

violates substantive due process, and exceeds Congress' authority under the Commerce Clause of Article I of the United States Constitution. (*See* generally, Defendants' Notice of Claim of Unconstitutional Federal Statute). The United States of America, as intervenor, filed a response to the Notice (Doc. 64), as well as a memorandum in opposition to Defendants' motions for summary judgment, limited to the unconstitutionality questions raised by Defendants (Doc. 85). Defendants JB & R and Great Seneca have also filed motions for summary judgment, arguing that they are entitled to summary judgment with respect to each of Plaintiff's claims (Docs. 73 and 72). These motions have been fully briefed and are now ripe for review.

II. RULE 56 STANDARD

The standard governing summary judgment is set forth in Fed.R.Civ.P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment will not be granted if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could not return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate,

however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *see also Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 588 (1986).

When reviewing a summary judgment motion, the Court must draw all reasonable inferences in favor of the nonmoving party, and must refrain from making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150-51 (2000). The Court disregards all evidence favorable to the moving party that the jury would not be required to believe. *Id.* Stated otherwise, the Court must credit evidence favoring the nonmoving party as well as evidence favorable to the moving party that is uncontroverted or unimpeached, if it comes from disinterested witnesses. *Id.*

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby, Celotex,* and *Matsushita* effected "a decided change in summary judgment practice," and ushered in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1476 (6th Cir.1989). The Court in *Street* identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily appropriate for summary judgment. *Id.* at 1479.

Additionally, in responding to a summary judgment motion, the nonmoving party "cannot rely on the

hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.' " *Id.* (*quoting Liberty Lobby,* 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party merely to " 'show that there is some metaphysical doubt as to the material facts.' " *Id.* (*quoting Matsushita,* 475 U.S. at 586).

Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* at 1479-80. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *In re Morris,* 260 F.3d 654, 665 (6th Cir.2001).

III. DISCUSSION

The facts of this case are substantively identical to those in *Rice v. Great Seneca Financial Corp.,* Case No. 2:04-cv-00951, a case concurrently decided by this Court. Plaintiff Hartman, who is represented by the same counsel that represented the *Rice* plaintiff, has asserted the same claims against the same two defendants named in the *Rice* case, Defendants JB & R and Great Seneca. The arguments advanced by Plaintiff Hartman in favor of summary judgment, and in opposition to Defendants' motions for summary judgment, are indistinguishable from those raised by the *Rice* Plaintiff. Likewise, Defendants have advanced the

same arguments in both cases. Because the issues raised in the instant case are identical to those raised in the *Rice* case, the Court adopts the holdings and analysis set forth in *Rice, supra.*

IV. DISPOSITION

For all of the reasons articulated in *Rice, supra,* the Court **GRANTS** Defendant Great Seneca's Motion for Summary Judgment (Doc. 72), **GRANTS** Defendant JB & R's Motion for Summary Judgment (Doc. 73), and **DENIES** Plaintiff's Motion for Partial Summary Judgment (Doc. 77).

The Clerk shall remove Documents 72, 73 and 77 from the Court's pending motions list.

The Clerk shall remove this case from the Court's pending cases list.

IT IS SO ORDERED.

Nos. 08-3773/3804
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DELORES HARTMAN (08-3773); DEBORAH L. RICE (08-3804),	)	FILED
	)	Sep. 22,
Plaintiffs-Appellants,	)	2009
	)	
UNITED STATES OF AMERICA, Intervenor,	)	
	)	ORDER
v.	)	
	)	
GREAT SENECA FINANCIAL CORP, ET AL.,	)	
Defendants-Appellees.	)	

BEFORE: MOORE and WHITE, Circuit Judges; and OLIVER District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge White would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

---

* Hon. Solomon Oliver, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

754566

[LOGO]

GREAT SENECA

FINANCIAL CORPORATION

DEBORAH L RICE

[Home Address Omitted]

IF ADDRESS AS SHOWN ABOVE IS INCORRECT, PLEASE INDICATE CHANGE BELOW:

NAME _____

ADDRESS _____

_____

ACCOUNT NUMBER
[redacted] 3025

NEW BALANCE
$ 2778.99

PAYMENT DUE DATE	MINIMUM PAYMENT
DUE NOW	$ 2778.99

PLEASE WRITE IN AMOUNT OF PAYMENT ENCLOSED $_____

PLEASE DETACH AND RETURN TOP PORTION WITH YOUR PAYMENT

ACCOUNT NUMBER	CREDIT LIMIT	CREDIT AVAILABLE	PAST DUE	STATEMENT CLOSING DATE
[redacted] 3025	0	0	$ 2778.99	08/08/03

DATE	REFERENCE NUMBER	NEW TRANSACTIONS	AMOUNT
08/08/03		BALANCE DUE GREAT SENECA FINANCIAL CORP., A MARYLAND CORPORATION, ASSIGNEE OF UNIFUND, ASSIGNEE OF PROVIDIAN P.O. BOX 1651 ROCKVILLE, MD 20849	$ 2,778.99

SUMMARY OF TRANSACTIONS	PREVIOUS BALANCE	PAYMENTS AND CREDITS	NEW BALANCE
			$ 2778.99

PROMPT CREDITING OF PAYMENTS: TO RECEIVE CREDIT FOR PAYMENTS AS OF THE DATE OF RECEIPT, WE MUST RECEIVE THE TOP PORTION OF THE STATEMENT AND YOUR CHECK OR MONEY ORDER BY 3:00 P.M. AT:

GREAT SENECA FINANCIAL CORPORATION
P.O. BOX 1651
ROCKVILLE, MD 20849

PAYMENTS RECEIVED AT THE ABOVE ADDRESS IN THE MANNER SPECIFIED AFTER THAT TIME WILL BE CREDITED TO YOUR ACCOUNT AS OF OUR NEXT BUSINESS DAY. THE CREDITING TO YOUR ACCOUNT OF PAYMENTS RECEIVED AT ANY LOCATION OTHER THAN THE ABOVE ADDRESS MAY BE DELAYED UP TO 5 DAYS FROM DATE OF RECEIPT.

PAYMENT DUE DATE	MINIMUM PAYMENT
DUE NOW	$ 2778.99

SEND INQUIRIES TO:

GREAT SENECA FINANCIAL CORPORATION
P.O. BOX 1651
ROCKVILLE, MD 20849

Supreme Court, U.S.
FILED
JAN 20 2010
OFFICE OF THE CLERK

No. 09-606

IN THE

Supreme Court of the United States

JAVITCH, BLOCK & RATHBONE, LLP, AND GREAT SENECA FINANCIAL CORP.,

Petitioners,

v.

DELORES HARTMAN, DEBORAH L. RICE, AND UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether 15 U.S.C. §§ 1692e, 1692e(10), 1692f, and 1692k(c) of the Fair Debt Collection Practices Act (FDCPA) are unconstitutional as applied to literally true but potentially misleading representations in pleadings under the First Amendment, Fifth Amendment, and the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution.

2. Whether evidence that a debt collector acted in good faith and reasonably under the circumstances qualifies for the bona fide error defense under the FDCPA, 15 U.S.C. § 1692k(c).

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STATEMENT OF THE CASE

1. In 1977, Congress enacted the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, "to eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e). Among other things, the statute prohibits the use of "any false, deceptive or misleading representation or means in connection with the collection of any debt." *Id.* In addition, the Act provides that a "debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." *Id.* § 1692f. The Act applies to lay debt collectors and to "attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation." *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995).

A substantial portion of debt collection activities is undertaken on behalf of companies that buy defaulted debts as an investment, paying pennies on the dollar and hoping to profit through the collection of a portion of the amount owed. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, CREDIT CARDS: FAIR DEBT COLLECTION PRACTICES ACT COULD BETTER REFLECT THE EVOLVING DEBT COLLECTION MARKETPLACE AND USE OF TECHNOLOGY 18-19, 26-30, 35 (2009) (hereinafter EVOLVING DEBT); FEDERAL TRADE COMMISSION, COLLECTING CONSUMER DEBTS: THE CHALLENGES OF CHANGE, A WORKSHOP REPORT 3-4 (2009) (hereinafter COLLECTING CONSUMER DEBTS). Typically, debt buyers purchase thousands (sometimes hundreds of thousands) of debts and attempt to collect on them en masse through letters,

phone calls, and legal action. *See* COLLECTING CONSUMER DEBTS, *supra*, at 3-4.

The Federal Trade Commission and others have reported concerns that "in practice, many debt collectors and debt buyers do very little to verify debts that consumers dispute" and that "the verification provided by debt buyers sometimes consists of little more than a written statement that the amount being demanded is what the creditor claims is owed." EVOLVING DEBT, *supra*, at 46. That concern is heightened by the "prevalence of default judgments in debt collection litigation." *Id.* at 41; *see also* COLLECTING CONSUMER DEBTS, *supra*, at 57 (noting that nearly half of debt collection actions in Cook County, Illinois, result in default judgments).

2. In October 2003 petitioner Javitch, Block & Rathbone, LLP ("Javitch") filed suit against respondents Hartman and Rice to collect credit card debts that had been purchased by a large debt buyer, petitioner Great Seneca Financial Corporation ("Great Seneca"). Pet. App. 6. Great Seneca had purchased the debt from Unifund CCR Partners, which had in turn purchased the debt from respondents' credit card issuer, Providian National Bank. Pet. App. 4. "With each sale, certain electronic information was transmitted," including the consumer's name and address, as well as the account number and current balance. Pet. App. 5.

Ohio law requires that plaintiffs making a claim "founded on an account or other written instrument" must attach to the complaint "a copy of the account or written instrument." Ohio Civ. R. 10(D)(1). Ohio courts have construed this to require that "a plaintiff must set forth an actual copy of the recorded

account," which must include, among other things, "a beginning balance," "listed items . . . dated and identifiable by number or otherwise, representing charges," and "a running or developing balance, or an arrangement of beginning balance and items which permits the calculation of the amount claimed to be due." Pet. App. 11 (quoting *Arthur v. Parenteau*, 657 N.E.2d 284, 286 (Ohio App. 3d Dist. 1995)).

To satisfy this obligation, Javitch attached as Exhibit A to its complaint a document that it represented to be "said Account." Pet. App. 6. The document "resembles a typical credit-card statement," even to the point of containing a space for the consumer to enter a change of address. *Id.* However, the document was not, in fact, a statement of account from the credit card issuer. Instead, it was "prepared by Great Seneca's law firm" in an attempt to comply with the Ohio pleading rules. *Id.*

When respondents Hartman and Rice hired attorneys and answered the complaints, Great Seneca dismissed the collection suit without prejudice. Pet. App. 7.

3. Respondents Hartman and Rice subsequently filed suit against petitioners Great Seneca and Javitch in federal court, alleging violations of the FDCPA. In particular, they alleged (1) that the claim that Exhibit A was a copy of the debtor's account "was false in violation of 15 U.S.C. §§ 1692e and 1692e(10)"; (2) that Exhibit A's resemblance to a credit-card statement was "deceptive and misleading in violation of §§ 1692e and 1692e(10)"; and (3) that using the Exhibit therefore constituted "an unfair means of debt collection under § 1692f." Pet. App. 8.

Petitioners moved for summary judgment in both cases, arguing among other things that Exhibit A was not false or misleading, that they were entitled to protection under the FDCPA's "bona fide error" defense, and that the statute was unconstitutional. The United States intervened in each case to defend the constitutionality of the statute. Pet. App. 7.

The district court granted summary judgment to petitioners in both cases. The court concluded that the representation that Exhibit A was an "account" was not false or misleading, Pet. App. 41, 44-45, and that petitioners, in any event, qualified for the bona fide error defense. Pet. App. 45-48.

4. The Sixth Circuit reversed.

a. The court first held that there were genuine issues of fact regarding whether petitioners violated the Act. The court declined to decide whether petitioners falsely represented that Exhibit A was an "account" within the meaning of the Ohio rules. Pet. App. 13. It was enough, the court held, that "Hartman and Rice have raised a genuine issue of material fact as to whether Great Seneca's and Javitch's representations were misleading or deceptive." *Id.* "Given the fact that the document appears to be a recent credit-card bill, which it is not, and with few indications to the contrary," the court held, "there is a genuine issue of material fact as to whether this document would mislead the least sophisticated consumer." Pet. App. 14.

b. The court further held that disputed issues of fact also precluded judgment in petitioners' favor under the bona fide error provision. The defense requires a defendant to "show[] by a preponderance of

evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c). The court noted that it had "recently held that this defense applies to mistakes of law as well as to clerical errors." Pet. App. 16 (citing *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 538 F.3d 469, 476 (6th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009)). But in this case, the court concluded, petitioners had not "shown that the violation was unintentional" because "Hartman and Rice assert that Great Seneca and Javitch made Exhibit A look like a credit-card statement in order to avoid Ohio law." Pet. App. 17. Further, petitioners had not "shown by a preponderance of evidence that they maintained procedures intended to avoid the type of error that occurred." *Id.* While petitioners had presented evidence relating to procedures intended to ensure that "the amount they alleged was actually the amount owed," they pointed to no procedures designed to avoid the specific violation alleged by respondents. *Id.* The court left open, however, the possibility that further factual development on remand could lead to a different result in the end. Pet. App. 18.

c. The Sixth Circuit also rejected petitioners' passing constitutional challenges to the statute as applied to their conduct.[1]

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[1] The court noted, but ultimately rejected, the United States' objection that petitioners waived their constitutional

The court of appeals first rejected petitioners' assertion that "they are immune from suit based on statements made during judicial proceedings," in light of "their constitutional right to petition granted in the First Amendment." Pet. App. 19. The court recognized that under the *Noerr-Pennington* doctrine, courts should construe statutes "to avoid burdening conduct that implicates the protections afforded by the Petition Clause." *Id.* (citation omitted). But, the Sixth Circuit held, this Court's decision in *Heintz v. Jenkins*, 514 U.S. 291 (1995), precluded any construction of the Act as inapplicable to litigation. *Id.*

Moreover, the court held, applying the Act to the conduct in this case would not violate the First Amendment. "[T]he Petition Clause protects legitimate petitioning but not sham petitions, baseless litigation, or petitions containing 'intentional and reckless falsehoods.'" Pet. App. 21 (quoting *McDonald v. Smith*, 472 U.S. 479, 484 (1985)). And in this case, the court explained, "Hartman and Rice assert that Great Seneca and Javitch intentionally misrepresented that Exhibit A was an 'account.'" Pet. App. 21-22.

The Sixth Circuit further rejected the claim that the FDCPA is unconstitutionally vague, finding that there was no allegation of arbitrary enforcement and that the FDCPA "provides adequate notice." Pet. App. 22. "[A]ny substantive-due-process argument

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arguments by failing to develop them in their brief before the Sixth Circuit. Pet. App. 18 n.7.

Great Seneca and Javitch have," the court continued, "is encompassed by their First Amendment claims." Pet. App. 23-24. And the statute did not violate the Commerce Clause by unduly interfering "with state rules of civil procedure." Pet. App. 24. "Holding Great Seneca and Javitch liable under the FDCPA has no effect on Ohio state law," the court observed. *Id.* "Instead, it punishes Great Seneca and Javitch for acting in a misleading and deceptive manner while using the Ohio court system." *Id.*

REASONS FOR DENYING THE WRIT

For the second time in two years, petitioner Javitch asks this Court to review a constitutional challenge to the FDCPA as applied to "literally true" statements. *See Javitch, Block & Rathbone, LLP v. Gionis*, No. 07-805, 128 S. Ct. 1259 (2008) (denying prior petition raising First Amendment challenge). This petition is no more worthy of review than the first. No court has accepted petitioners' constitutional arguments. And, in fact, the first question presented by the petition does not even arise on the facts of this case in its present interlocutory posture – the court of appeals resolved petitioners' constitutional challenge on the assumption that a jury could find that petitioners' statements were knowingly false. As a result, it did not pass upon petitioners' constitutional challenge to the Act's application to "literally true" statements. And, in any event, petitioners' constitutional claims are baseless.

Nor is the second question presented by the petition worthy of the Court's attention. No court has accepted petitioners' apparent position that the

"reasonable procedures" element of the "bona fide error defense may be dispensed with when there is an absence of precedent on a particular legal question. That argument is foreclosed by the plain text of the statute and provides no basis either for granting certiorari or for holding this petition pending the outcome of the Court's resolution of the very different question posed in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 08-1200.

I. The Sixth Circuit's Rejection Of Petitioners' Constitutional Claims Does Not Merit Interlocutory Review.

Petitioners' various constitutional challenges to the FDCPA as applied to "literally true but potentially misleading representations in pleadings," Pet. i, do not warrant review by this Court and are meritless in any event.

A. Petitioners' Constitutional Claims Are Not Certworthy.

Petitioners do not allege that there is any division in the courts of appeals over the constitutionality of the FDCPA, either as a whole or in any subset of its applications.[2] Indeed, it appears that the Sixth

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[2] As the Sixth Circuit noted, "[a]ll circuits to consider the issue, except for the Eleventh, have recognized the general principle that the FDCPA applies to the litigation activities of attorneys who qualify as debt collectors under the statutory definition." Pet. App. 21 (quoting *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 232 (4th Cir. 2007)). That statement should not be understood to imply that the Eleventh Circuit has construed the Act not to apply to litigation conduct, nor that it

Circuit is the first court of appeals to decide any First Amendment or Commerce Clause challenge to the statute.[3] Moreover, as far as respondents can determine, every district court to have considered a constitutional challenge to the FDCPA has rejected it. *See, e.g.*, *Basile v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 632 F. Supp. 2d 842, 845-46 (N.D. Ill. 2009) (rejecting First Amendment challenge); *Gerber v. Citigroup, Inc.*, No. CIV S-07-0785 WBS JFM PS, 2009 WL 248094, at *4 (E.D. Cal. Jan. 29, 2009) (same); *Sial v. Unifund CCR Partners*, No. 08 CV 0905 JM (CAB), 2008 WL 4079281, at *2-*4 (S.D. Cal. Aug. 28, 2008) (same); *Delawder v. Platinum Fin. Servs. Corp.*, 443 F. Supp. 2d 942, 951 (S.D. Ohio 2005) (rejecting Commerce Clause challenge); *Newman v. Checkrite Cal., Inc.*, 912 F. Supp. 1354, 1364-66 (E.D. Cal. 1995) (rejecting federalism challenge to the application of the FDCPA to attorney conduct).

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found that such application would be unconstitutional. Instead, the Eleventh Circuit decision to which *Sayyed* referred held only that "a legal action does not constitute an 'initial communication' within the meaning of the FDCPA," and therefore does not trigger the Act's validation notice requirement. *Vega v. McKay*, 351 F.3d 1334, 1337 (11th Cir. 2003).

[3] The only other court of appeals to consider a constitutional challenge to the Act also rejected it, in an unpublished opinion. *Hester v. Graham, Bright & Smith, P.C.*, 289 Fed. Appx. 35, 42-44 (5th Cir. 2008) (holding that the statute's definition of "debt collector" is not unconstitutionally vague).

That is reason enough to deny the petition. But in addition, petitioners' challenge to the Act as applied to "literally true but potentially misleading representations in pleadings," Pet. i, was not decided by the Sixth Circuit and does not arise on the facts of this case as it comes to this Court. The court of appeals declined to decide whether petitioners' representation that Exhibit A was an "account" was "literally true." Pet. App. 13. Deciding that question, the court explained, "would require us to decide what 'account' means under Ohio law," and was unnecessary given the court's independent conclusion that a trial was required to decide whether the statements were, at the very least, misleading or deceptive. *Id.* Consequently, in reviewing petitioners' First Amendment challenge, the court of appeals assumed that "Great Seneca and Javitch intentionally misrepresented that Exhibit A was an 'account.'" Pet. App. 22.

Petitioners insist that this assumption was counterfactual and unsupported as a matter of Ohio law. Pet. 20, 27-28. But that case-specific disagreement with the decision below does not present a certworthy question. Nonetheless, to reach the constitutional question presented by the petition, this Court would have to resolve the predicate question, delving into a disputed issue of state law without the benefit of any decision on that question from the court of appeals. And if the Court concluded that petitioners' statement was, in fact, false, it would not reach the constitutional question it had granted certiorari to resolve. On the other hand, if the Court took the case on the unfounded assumption that petitioners' representation was literally true,

any decision on the basis of that assumption would not resolve this case; respondents would still be entitled to a remand to prove that the statement was false.

This case thus illustrates the wisdom of the Court's general presumption against review of interlocutory judgments. *See, e.g., Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967). The Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of petition for writ of certiorari). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Here, the interlocutory posture leaves unsettled factual questions that are critical not only to whether the case even presents the question that petitioners ask the Court to decide, but also to the underlying constitutional rules that petitioners ask the Court to employ. *See* Pet. App. 21-22 (explaining that even if the Petition Clause applies to good faith petitioning conduct, it does not protect "intentional and reckless falsehoods") (citation omitted). And it remains possible that proceedings on remand will obviate the need for any court to decide the constitutional challenge (as might happen here if, for example, petitioners were able to establish their bona fide error defense at trial, *see* Pet. App. 18). In such a case, the Court's preference for review upon final judgment is consistent with the Court's broader obligation to avoid unnecessary constitutional adjudication. *See, e.g., Ala. State Fed'n of Labor v.*

McAdory, 325 U.S. 450, 461 (1945) ("It has long been [the Court's] considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision.") (citations omitted).[4]

B. Petitioners' Constitutional Claims Are Meritless.

1. The First Amendment does not bar application of the FDCPA to petitioners' conduct. As petitioners themselves concede, the Petition Clause, like the First Amendment generally, does not protect intentional misrepresentations. Pet. 15; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact"); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) ("Misrepresentations . . . are not immunized when

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[4] The Court also should await a case in which the constitutional questions were thoroughly briefed in the court of appeals. Here, the entirety of petitioners' constitutional challenge was set forth in a single sentence at the end of their brief: "If, notwithstanding the argument set forth above [regarding the statutory issues], this Court reverses on liability and bona fide error, Appellees pray this Court affirm based on the alternative grounds argued by Appellees below." Petrs. C.A. Br. 62. Although the court of appeals ultimately concluded that this reference encompassed the constitutional arguments made in the district court and eventually rejected those arguments on the merits, petitioners' halfhearted presentation of their claims below counsels against awarding plenary review in this Court. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts.").

used in the adjudicatory process."). Nor does the Petition Clause protect "intentional and reckless falsehoods." *McDonald v. Smith*, 472 U.S. 479, 484 (1985). "The first amendment interests involved in private litigation – compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts – are not advanced when the litigation is based on intentional falsehoods." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (citation omitted); *see also, e.g.*, *Whelan v. Abell*, 48 F.3d 1247, 1254 (D.C. Cir. 1995) ("We see no reason to believe that the right to petition includes a right to file deliberately false complaints."). As noted above, the Sixth Circuit assumed for purposes of summary judgment that the attachments at issue here were false and intentionally misleading. Pet. App. 21-22. Petitioners do not dispute the court of appeals' legal conclusion that under that view of the facts, the First Amendment is not violated. Any constitutional challenge based on a different view of the facts must await final judgment.

2. Petitioners further argue that the FDCPA is unconstitutionally vague. *See* Pet. 16-17, 24-26. But the FDCPA is not so open-ended as to deprive "the person of ordinary intelligence [of] a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). While some of the terms of the statute are broad, "economic regulation is subject to a less strict vagueness test" because of its narrow subject matter and the greater sophistication of regulated entities. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498

(1982). And here, the FDCPA regulates the commercial conduct of businesses that can be expected to "consult relevant legislation in advance of action." *Id.* at 498.

This Court has rejected "void-for-vagueness" challenges to economic regulation more broadly worded than the FDCPA. *See, e.g., United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29 (1963) (rejecting challenge to Robinson-Patman Act's prohibition on fixing "unreasonably low prices for the purpose of destroying competition or eliminating a competitor"); *Nash v. United States*, 229 U.S. 373 (1913) (rejecting challenge to Sherman Act's prohibition on "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade"). And as applied in this case, there is nothing particularly difficult to understand about the Act's prohibition against using false, deceptive, or misleading representations in connection with the collection of a debt. *See Kay v. United States*, 303 U.S. 1, 7 (1938) (rejecting a vagueness challenge to a statute criminalizing certain knowingly false statements relating to a federal home loan program).

3. Petitioners' Commerce Clause challenge similarly lacks merit. The FDCPA falls comfortably within Congress's authority "to regulate those activities having a substantial relation to interstate commerce." *Lopez v. United States*, 514 U.S. 549, 558-59 (1995). Congress found, and petitioners concede, that consumer debt collection has such an effect on interstate commerce. *See* 15 U.S.C. § 1692(d); Pet. 26.

Petitioners argue instead that the Act exceeds Congress's powers as applied in this case, because the "content of state court pleadings and regulating the practice of law, are areas traditionally recognized as falling within the ambit of state concern." Pet. 26. Accordingly, they argue, it would be inconsistent with the division of state and federal authority implicit in the Commerce Clause for "adherence to state standards" of pleading in state court to "result[] in liability under federal standards." Pet. 27. "Contrary to the assessment of the panel," petitioners continue, their pleading in this case fully satisfied Ohio law. *Id.* As a result, they imply, holding their conduct to violate the FDCPA would "infring[e] on the state's traditional role of regulating attorneys." *Id.*

This Court has repeatedly rejected the assertion that the Constitution prohibits Congress from regulating activities otherwise falling within the Commerce Power simply because they touch upon matters of traditional state jurisdiction, including regulation of the legal profession. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (rejecting "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'"); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) (recognizing states' traditional role in regulating the legal profession, but declining to construe the Sherman Act to exclude coverage of state bar associations).

Nor does the FDCPA, as applied in this case, impose any intolerable interference with state prerogatives. The Sixth Circuit's interpretation of the FDCPA does not dictate pleading standards to state courts or otherwise interfere with states' control of their own judicial systems. Respondents allege that petitioners violated both the FDCPA and state pleading rules, and petitioners do not claim that the Commerce Clause prohibits Congress from imposing federal obligations that coincide with state pleading requirements. *Cf. United States v. Bongiorno*, 106 F.3d 1027, 1033-34 (1st Cir. 1997) (rejecting constitutional challenge to federal statute criminalizing failure to comply with out-of-state child support orders). Instead, petitioners' constitutional argument is premised on the assertion – not accepted by the court of appeals – that their pleading fully complied with Ohio law. In the unlikely event that petitioners succeed on remand in showing that their pleading complied with state law, but nonetheless are held liable, they will be free to reassert their Commerce Clause challenge on appeal from final judgment.

II. Certiorari Is Not Warranted To Consider Whether Petitioners Can Avail Themselves Of The Bona Fide Error Defense.

1. With the second question presented, petitioners ask this Court to grant certiorari to review whether "evidence that a debt collector acted in good faith and reasonably under the circumstances qualifies for the bona fide error defense." Pet. i. They urge this Court to adopt an "objective test" that would essentially eliminate the FDCPA's

requirement that a defendant seeking to avail itself of the bona fide error defense show that it maintains "procedures reasonably adapted to avoid such error." 15 U.S.C. § 1692k(c). Instead, petitioners seek to broaden the scope of the defense to shield all errors that are unintentional and made in good faith, which would in turn hinge on "what was reasonable to believe at the time and under the circumstances." Pet. 30.

As an initial matter, petitioners have waived this argument by failing to challenge the "reasonable procedures" requirement in either the district court or the court of appeals. *See, e.g.*, *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (noting that this Court "ordinarily will not decide questions not raised or litigated in the lower courts"). In both courts, petitioners affirmatively acknowledged that they could only prevail under the bona fide error defense if they could show that they maintained procedures reasonably adapted to avoid error. *See* Petrs. C.A. Br. 59-60; Memo. in Support of Motion for Summary Judgment of Defendant Javitch, Block & Rathbone at 17-19, *Rice v. Great Seneca Financial Corp.*, 556 F. Supp. 2d 792 (S.D. Ohio 2009) (No. 2:04-cv-00951); Memo. in Support of Motion for Summary Judgment of Defendant Great Seneca Financial Corp. at 12-14, *Rice*, 556 F. Supp. 2d 792 (No. 2:04-cv-00951).

Moreover, the interlocutory posture of this case, *see supra* at 11-12, renders it an extraordinarily poor vehicle through which to consider the second question presented. In the decision below, the Sixth Circuit merely reversed the district court's decision granting summary judgment to petitioners on their

bona fide error defense. Pet. App. 17-18. In so doing, the court of appeals specifically left open the possibility that, "as the litigation proceeds on remand," petitioners could still "establish the elements of the [bona fide error] defense by a preponderance of the evidence," Pet. App. 18, a possibility that would render this Court's disposition of the second question presented irrelevant.

2. Finally, certiorari is not warranted because petitioners cannot identify even a single decision supporting their proposed "objective test," much less any division among the courts of appeals on the question presented.[5] This dearth of authority is hardly surprising, however, insofar as the text of the FDCPA explicitly requires a showing that the debt collector maintains procedures reasonably adapted to avoid errors. *See* 15 U.S.C. § 1692k(c).

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[5] Although petitioners cite three district court decisions as ostensibly supporting their argument, Pet. 30, those cases are inapposite, as all three courts indicated that the bona fide error defense will apply only if the defendant can show that it maintained procedures reasonably adapted to avoid the error. *See Charbonneau v. Mary Jane Elliott, P.C.*, 611 F. Supp. 2d 736, 743 (E.D. Mich. 2009) (a defendant needs to show only "reasonable precautions" were taken, rather than "every conceivable" precaution); *Kirk v. Gobel*, 622 F. Supp. 2d 1039, 1049 (E.D. Wash. 2009) (finding FDCPA violation but allowing debt collector to pursue bona fide error defense and indicating that "discovery regarding [the defendant's] preventative procedures is necessary"); *Castro v. Collecto, Inc.*, No. EP-09-CA-215-FM, 2009 WL 3617557, at *23 (W.D. Tex. Oct. 27, 2009) (finding that the defendants had employed reasonable procedures to avoid the legal error at issue).

At bottom, petitioners' bona fide error argument boils down to a complaint that the Sixth Circuit should have concluded, based on the facts before it, that petitioners did indeed maintain reasonable procedures to avoid errors. But such a fact-bound determination is hardly an appropriate question for this Court's review.

Nor is there any reason to follow petitioners' alternative suggestion to hold this case pending this Court's decision in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 08-1200. That case presents the question whether the bona fide error defense extends to legal errors. *See* Pet. Cert., *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, No. 08-1200. But the Sixth Circuit's decision in this case rested on the assumption that the bona fide error defense *does* apply to mistakes of law. *See* Pet. App. 16-17. The Sixth Circuit nonetheless held that summary judgment was inappropriate with regard to the bona fide error defense because petitioners had not shown either that the violation was unintentional or that they maintained reasonable procedures to avoid the error. *Id.* 17-18. As such, this Court's resolution of the question in *Jerman* cannot improve petitioners' position, and the case should accordingly be permitted to proceed without delay before the district court. And in any event, because this case comes to the Court in an interlocutory posture, the Sixth Circuit and the district court can always consider any possible ramifications arising from this Court's opinion in *Jerman* on remand.

III. None Of The Remaining Issues Raised In The Petition Fall Within The Scope Of The Questions Presented Or Otherwise Warrant This Court's Review.

Petitioners raise a variety of other issues that, in their view, justify a grant of certiorari. But none of those issues are encompassed by the questions presented, much less worthy of this Court's review.

1. Petitioners first attempt to conjure up a division among the circuits on the question "whether [the] least sophisticated consumer standard under the FDCPA for literally true but potentially misleading statements is always [a] question of law, always a jury question, or requires evidence of consumer confusion to create a genuine issue of material fact requiring a jury trial." Pet. 18-19. However, the question of who decides whether a statement is misleading has no bearing on the specific constitutional claims raised by petitioners and falls well outside the scope of the questions presented. *See* Pet. i; *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32, 31 n.5 (1993) (holding that discussion of issue in text of petition did not bring the issue within the questions presented).

Moreover, the decision in this case did not address whether the "least sophisticated consumer" standard presents a question for the jury or the judge. The court of appeals simply held that summary judgment was impermissible because of disputed issues of material fact. *See* Pet. App. 14, 18. Whether those

factual disputes should be resolved by judge or jury, the court of appeals did not say.

But in any event, the cases on which petitioners rely do not establish a square conflict warranting review by this Court. First, the decisions of the Second, Third, and Ninth Circuits do not address the question posed by petitioners at all, instead considering whether language in a debt collection letter "overshadows or contradicts" the validation notice disclosures required by Section 1692g. *See Terran v. Kaplan*, 109 F.3d 1428, 1432 (9th Cir. 1997) (explaining that "the question whether language in a collection letter overshadows or contradicts the validation notice so as to confuse a least sophisticated debtor is a question of law" because the determination "does not turn on the credibility of extrinsic evidence"); *see also Shapiro v. Dun & Bradstreet Receivable Mgmt. Servs., Inc.*, 59 Fed. Appx. 406, 407-08 (2d Cir. 2003) ("The question of whether language in a debt-collection letter overshadows or contradicts other language in an impermissible fashion is a question of law we review *de novo*."); *Wilson v. Quadramed Corp.*, 225 F.3d 350, 353 n.2 (3d Cir. 2000) (same).

Although the remaining circuits cited in the petition have actually addressed the application of the least sophisticated consumer standard in the context of Section 1692e, here too petitioners' purported circuit split proves illusory. To be sure, the Sixth Circuit has held that a debt collection notice may be misleading if it is "open to more than one reasonable interpretation, at least one of which is inaccurate"; in those situations, a jury must decide

whether the letter is "susceptible to [such] a reading by the least sophisticated consumer." *Kistner v. Law Offices of Michael P. Margelefsky, LLC*, 518 F.3d 433, 441 (6th Cir. 2008) (citation omitted). However, the court in *Kistner* took care to describe that standard as merely "a useful tool in analyzing the 'least-sophisticated-consumer' test," *id.*, without any suggestion that such a standard was the *only* acceptable approach.

In *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009), the Fifth Circuit made clear that the inquiry into whether a debt collection letter is deceptive, as well as the question whether that determination is made by a court or a jury, hinges on the nature of the letter itself. At one end of the spectrum, the court explained, are letters that are, as a matter of law, not deceptive "based on the language and placement of a disclaimer," *Gonzalez*, 577 F.3d at 606; at the other end of the spectrum are letters that "are so deceptive and misleading as to violate the FDCPA as a matter of law," *id.* The letters in the middle of the spectrum, the Fifth Circuit continued, "present closer calls" and thus are a question for the jury. *Id.*; *see also Kistner*, 518 F.3d at 441 (explaining that a "jury should determine whether the letter is deceptive and misleading" based on conflicting aspects of the letter).

This case-by-case approach is on all fours with the approach employed by the Seventh Circuit, which also places "suits alleging deceptive or misleading statements . . . into three distinct categories," *Ruth v. Triumph P'ships*, 577 F.3d 790, 800 (7th Cir. 2009): (1) "cases involving statements that plainly, on their face, are not misleading or deceptive," *id.*; (2) cases

involving "collection notices [that] are clearly misleading on their face," *id.* at 801; and (3) cases "involv[ing] statements that are not plainly misleading or deceptive but might possibly mislead or deceive the unsophisticated consumer," *id.* at 800. In the first two categories, the Seventh Circuit has held, extrinsic evidence is not required "to determine whether consumers were confused." *Id.* Thus, a court may dismiss the case or grant summary judgment "based on [its] own determination that the statement complied [or did not comply] with the law." *Id.* In the third category, however, a plaintiff "may prevail only by producing extrinsic evidence, such as consumer surveys, to prove that unsophisticated consumers do in fact find the challenged statements misleading or deceptive." *Id.*

2. Petitioners' remaining arguments, made largely in passing, also fall short. *See, e.g.*, Pet. 20 (disputing the court of appeals' view of the summary judgment evidence); Pet. 17-18 (asserting that Congress did not intend the FDCPA to "abrogate the common law litigation privilege"); Pet. 21-24 (arguing that despite the Court's decision in *Heintz v. Jenkins*, 514 U.S. 291 (1995), the FDCPA does not apply to litigation conduct); Pet. 33-35 (arguing that Sections 1692e, 1692e(10) and 1692f do not apply to potentially misleading statements in litigation). None of these arguments is encompassed within the scope of either of the questions presented. Nor do petitioners allege a conflict among the circuits with regard to any of these issues.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

JAVITCH, BLOCK & RATHBONE, LLP, AND GREAT SENECA FINANCIAL CORP.,
Petitioners,

v.

DELORES HARTMAN, DEBORAH L. RICE, AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

1. There is no "interlocutory" impediment to granting review here. BIO pp. 7, 8, 11-12, 17-19. The district court ruled on summary judgment that the evidence showed Petitioners "did, in fact, have a valid claim against [Respondents] and Exhibit A was a record generated by ... Great Seneca that accurately reflected the terms of that account." Pet. App. 38-41, 60. The Court further held the statement, "[a] copy of the said Account is attached hereto as 'Exhibit A,'" was not literally false. Pet. App. 38-41, 60. The Sixth Circuit reiterated these facts, observing the facts were undisputed.[1] There are no grounds for Respondents to show on remand[2] the state court pleadings were baseless, false or contained an "intentional misrepresentation." There is therefore, no obstacle to review by this Court. See e.g., *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 116 (2004) (reviewing appellate court's reversal of summary judgment awarded petitioners in the district court on statutory affirmative defense of fair use to claim of trademark infringement).

2. The constitutional issues are squarely presented. The Sixth Circuit understood the constitutional challenge in this case involved application of the FDCPA to literally true but

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[1] The Sixth Circuit recited verbatim a portion of the findings of fact of the district court, Pet. App. 3-6, noting that these facts were irrelevant to its disposition of the appeal. Id. at 31-32; 55-56.

[2] The law of the case and the mandate rule preclude relitigation of the issue of falsity. 18B Wright, Miller & Cooper, Federal Practice & Procedure § 4478.3 (2d ed. 2009).

potentially misleading representations in a pleading, as it held:

> A debt collector who made literally true representations in a petition that violated the FDCPA because the representations were misleading would be protected from liability by the BFE defense if the collector could show that the mistake was unintentional, made in good faith, and that the collector had procedures to avoid such a mistake.

Pet. App. 22. The clear import of the Court's holding was that imposing strict liability on debt collectors for literally true allegations in their pleadings is constitutionally permissible.

Petitioners and the United States[3] fully briefed the constitutionality of the FDCPA in the district court, which the district court declined to address. Pet. App. 50. See e.g. Hartman v. Great Seneca Fin. Corp., 2:04-CV-972 Doc. Nos. 52, 64 & 66; ROA 08-3773, pp. 86-107, 114-33, 135-45. Petitioners were prevailing parties on appeal; as such, they were free to "assert ... any ground in support of [the] judgment, whether or not that ground was relied upon or even considered by the trial court," which they did. *Dandridge v. Williams*, 397 U.S. 471, 476, n. 6 (1970). Under the rule of constitutional avoidance, the Court of Appeals only had to address the constitutional questions presented by Petitioners *if*

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[3] The United States intervened in the district court, and participated in the appeal, urging the Sixth Circuit to find the FDCPA constitutional. See e.g., Case No. 08-3773 Document. 00614746282 Filed 12/09/2008.

doing so was unavoidable, which it did. *Northwest Austin Mun. Utility Dist. No. One v. Holder,* __U.S. __, 129 S.Ct. 2504, 2517 (2009) (Thomas, J., concurring in part). Review of the constitutional issues by this Court would therefore be proper. *Citizens United v. FEC*, __U.S. __, 2010 WL 183856, 9-12 (January 21, 2010).

3. Respondents opposition makes plain that they want their cake and eat it too. In the district court, they argued that Petitioners violated the FDCPA when they allegedly "made a ***false statement of law*** about a document it attached to its complaint." Case 2:04-CV-972 Doc. No. 77 Filed 10/01/2007 Page 12 of 17, 6th Cir. ROA 08-3773 Vol 1, pg 1148 (emphasis added); Pet. App. 39. They prevailed on the appellate Court to assess what Ohio law requires when pleading an account claim, even though the Court got it wrong and ultimately declined to decide "what 'account' means under Ohio law." Pet. App. 11-12. The Court reversed the District Court's ruling on the bona fide error defense because "[t]he error made by Great Seneca and Javitch was **a mistake of law**; they represented that Exhibit A was an account in a manner that could be found to be misleading or deceptive." Pet. App. 17 (emphasis added). Now Respondents suggest that this case isn't worthy of review because it would require the Court to delve into "a disputed issue of state law." BIO p. 10.

In like fashion, they suggest that whatever the outcome of *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA* et al., Case No. 08-1200, "the district court can always consider any possible ramifications arising from this Court's opinion in *Jerman* on remand." BIO, p. 19. In *Jerman*, counsel

for Respondents argue that debt collectors should never be allowed to assert a bona fide error defense based on mistakes of law, which in this case involves the meaning of the term 'account' under Ohio law. If making a potentially misleading statement of state law in a petition is actionable under 15 U.S.C. §§ 1692e, 1692e(10) or 1692f, and this Court reverses *Jerman*, Petitioners will have no ground to left to stand on, as the availability of a bona fide error for a mistake of law hangs in the balance in *Jerman*. Under both the mandate rule and the law of the case, allowing the Sixth Circuit's decision to stand in this case could expose Petitioners to absolute liability should this Court reverse *Jerman*. If *Jerman* is affirmed, the first question presented will nonetheless remain unanswered to the extent it raises issue of the constitutionality of the bona fide error defense as applied under 15 U.S.C. § 1692k(c). Pet. § II(A).

Further, during oral argument in *Jerman*, Petitioner's counsel, Mr. Russell, suggested that, as applied to litigation, Congress likely intended the FDCPA's interpretation to be reigned in under the *Noerr-Pennington* doctrine, rather than by an expansive, legal-error inclusive, interpretation of the bona fide error defense:

> I should also mention, Justice Breyer, to the extent there are some really intractable problems with respect to the act application to attorneys, there -- there is ongoing litigation in the lower courts about the Noerr-Pennington doctrine about how the constitutional implications of regulating in-court

> activity apply to the Court's interpretation of the statutory provisions. And again, I think it's more likely that that is the solution Congress would have intended, an interpretive solution –
>
> ...
>
> JUSTICE BREYER: Okay. But then what --how -- but I still can't figure out how we get this thing to work here, and -- and you just came up with a new idea.
> MR. RUSSELL: Well, no. It's -- again, it's the same idea, that you construe the provisions in a way that avoid the most troublesome applications of it to attorney conduct. ...

Transcript of Argument, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA* et al. Case No. 08-1200, p. 21, 22, reprinted online at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-1200.pdf.

Here, Respondents' Counsel points out that every court to have considered limiting the application of the FDCPA as applied to litigation under the First Amendment and the *Noerr-Pennington* doctrine, has rejected this approach. BIO 9; see also e.g. *Berg v. Merchants Ass'n Collection Div., Inc.*, 586 F.Supp.2d 1336, 1345 (S.D. Fla. 2008); *Mark v. J.C. Christensen & Associates, Inc.*, Unreported Case. No. 09-100, 2009 WL 2407700, 7-9 (D.Minn. August 4, 2009); *Gallagher v. Gurstel, Staloch & Chargo, P.A.*, 645 F.Supp.2d 795, 804 (D. Minn. 2009).

a. It is largely because of *Heintz v. Jenkins*, 514 U.S. 291 (1995) that the difficult constitutional questions arise in this case, and its meaning is clearly within the scope of the questions presented. Invariably, *Heintz v. Jenkins* is cited as a cornerstone underlying the rationale in cases extending the FDCPA to state court litigation and for rejecting the *Noerr-Pennington* doctrine in this context. Pet. App. 19-21; see also *Pepper v. Routh Crabtree, APC*, 219 P.3d 1017, 1023 (Alaska 2009); *Donohue v. Quick Collect, Inc.*, __ F.3d. __, 2010 WL 103653, 5 (9th Cir. 2010). Petitioners respectfully submit that *Heintz v. Jenkins*, should be revisited and reversed, limited or eclipsed by the application of the *Noerr-Pennington* doctrine, when the FDCPA is applied to a lawyer's litigation conduct.

i. The cornerstone on which *Heintz* rested was the spurious conclusion that "[i]n ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly "attempts" to "collect" those consumer debts. See, e.g., Black's Law Dictionary 263 (6th ed. 1990) ('To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings')." *Heintz*, 514 U.S. 291, 294. Strikingly, the definition of "collect" was omitted from both the Seventh (1999), and Eighth (2004) edition of Black's Law Dictionary. The reason for its omission can be gleaned from the fact that the definition was incorrect. See Black's Law Dictionary, preface pp. x-xi (7th ed. 1999). The definition of "collect" relied on in *Heintz* was purportedly drawn from a New York state court decision from 1925. Black's Law Dictionary 328 (Rev. 4th ed. 1968):

> To gather together; to bring scattered thing (assets, accounts, articles of property) into one mass or fund; to assemble.
>
> To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings. *Isler v. National Park Bank of New York*, 239 N.Y. 462, 147 N.E. 66, 68.

See also Black's Law Dictionary, p.238 (5th ed. 1979). A review of the *Isler* case reveals it neither supports a reading of the term "collect" as extending to legal proceedings, nor the proposition that a lawyer is a debt collector.

> We are of the opinion that the phrase 'failure or delay in collecting or remitting' does not cover this case. **'Collecting' is defined by Webster's Dictionary as meaning: 'To demand or obtain payment of an account or other indebtedness.'** Here was something more than failure to demand and collect an account which was due. Possession of property was turned over to the alleged debtor, and the loss was created, not by failure to collect an outstanding account, but by this neglected delivery of property to him.

Isler v. National Park Bank of New York 239 N.Y. 462, 468, 147 N.E. 66, 68 (N.Y.1925) (emphasis

added). The first stone on which *Heintz* rested its holding is therefore, demonstrably unsound.

ii. In ordinary English, a 'lawyer' does not mean the same thing as a 'debt collector,' 'litigation' is not synonymous with 'debt collection,' and the term "collect" does not include litigation. See American Heritage Dictionary, p. 260 (1973) (defining 'collector' as "a person or thing that collects . . a person employed to collect taxes, duties or other payments"); p. 742 (defining 'lawyer' as "one whose profession is to give legal advice and assistance to clients and represent them in court. . . . Synonyms: lawyer, attorney, counselor, counsel, barrister, solicitor, advocate. These nouns denote persons who practice law"); p. 763 (defining 'litigation' as "legal action or process") and p. 261 (defining 'collect' as "[t]o call for and obtain payment of: *collect taxes*...[;] to take in payments or donations").

iii. Congress used the term "collect" as contradistinguished from the term "litigation" to signify the legislation was intended to govern the communications, acts and practices undertaken by the unregulated "debt collection" industry, not litigation engaged in by lawyers. *Senate Comm. on Banking, Housing & Urban Affairs*, Markup on Debt Collection Legislation 19-32 (June 30, 1977); H. R. Rep. 94-1202, 94th Cong. (1976); H.R. Rep. 95-131, 95th Cong. (1977); S.Rep.95-382, *reprinted in* 1977 U.S.C.C.A.N. 1695 (1977).

iv. The second reason advanced by the Court in *Heintz* to support the conclusion that the Seventh Circuit was correct and that the Sixth Circuit decision in *Green v. Hocking* was wrong, was premised on the import of the 1986 amendment to the FDCPA that repealed the attorney exemption

contained in the original enactment. *Heintz*, 514 U.S. 291, 294-295. The court observed the exemption was repealed, not narrowed.

> Without more, then, one would think that Congress intended that lawyers be subject to the Act whenever they meet the general "debt collector" definition[,] ... [which includes] those who 'regularly collec[t] or attemp[t] to collect, directly or indirectly, [consumer] debts owed or due or asserted to be owed or due another.' § 1692a(6).

Id. This inference presupposes that the Act regulated litigation by debt collectors before the exemption was repealed and that the term "collect" was intended to include litigation. Neither proposition is valid.

The Court then rejected each of the three arguments advanced in support of *Heintz* that the act should be read as containing an implied exception for litigation – perceived harmful anomalous results, a statement made Congressman Annunzio after the legislation was enacted, and the FTC commentary.

v. There are additional reasons not considered by the Court in *Heintz* that demonstrate that when applying the Act to lawyers who meet the general "debt collector" definition, Congress did not have litigation in mind. *First*, the *Heintz* Court did not consider the constitutional implications raised here. *Second*, the legislative history of the Act when it was originally considered by Congress between 1975-77 was not evaluated by the Court, which shows the term "collect" did not encompass litigation. *Third*, the purpose of the 1986 amendment was not intended to

expand the scope of the FDCPA, nor does the legislative history evidence an intent to govern lawyers engaged in litigation. *Fourth*, common law privileges and immunities were not addressed in *Heintz* or abrogated by Congress when the FDCPA was enacted or amended. *Fifth*, the history of amendments made to the Act after 1986 shows that litigation was not intended to be covered by the FDCPA. *Sixth*, in light of the universe of terms of art applicable only to litigation,[4] it requires nothing short of a fantastic assumption to reach the conclusion that Congress intended the loose language of the FDCPA to govern every communication occurring in state court litigation, when Congress prohibited debt collectors from uttering "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e.

4. The remaining issues addressed in the petition fall within the scope of the question presented, because "there can be little doubt that granting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 56 (2006).[5]

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[4] For example, terms such as pleadings, suit, subpoena, deposition, interrogatories, affidavits, evidence, hearings, trial, motions, affirmative defense, summary judgment, etc.

[5] Respondent argues this Case is not worthy of review because the constitutional issue in this case was presented two years ago in Javitch, Block & Rathbone, LLP v. Gionis, No. 07-805. The denial of certiorari is not a reflection of the merits of a case. *United States v. Carver*, 260 U.S. 482, 490 (1923). Moreover, Respondent Gionis died before that case was filed in this Court,

5. The constitutional question also encompasses the evidence, how the evidence is to be construed, and under what standard the evidence is to be assessed. *Citizens United v. FEC*, __U.S. __, 2010 WL 183856, 9 (January 21, 2010). The Courts clearly require this Court's guidance on how such claims are to be assessed. Pet. 18-21.

Respondents posit that the Sixth Circuit made its determination of the constitutional issues here not on the evidence, but "on the **assumption** that **a jury could find** that petitioners' statements were knowingly false," and because it "**assumed** that that Great Seneca and Javitch intentionally misrepresented that Exhibit A was an 'account.'" BIO p. 7, 10 (emphasis added).[6] At a minimum, it was error for the Court to resolve the constitutional issues without a showing that the Petitioners had in fact made intentional misrepresentations or made statements that were knowingly false. *Citizens United v. FEC*, __U.S. __, 2010 WL 183856, 41 (January 21, 2010) (Roberts, CJ, concurring).

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

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arguably abating the controversy. Pet. Case No. 07-805, pp. ii, 34.

[6] Respondents make no argument that these assumptions were grounded on the pleadings, any evidence presented, or a construction of the facts. See Pet. App. 41 (Respondents "failed to demonstrate that the statement contained in paragraph two of the state court complaint is false.").

Respectfully submitted,

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